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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Petitioners,

v.

JANET KATHLEEN WAGNER, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Must victims having cognizable constitutional claims under 42 U.S.C. § 1983 for a deliberate police cover-up of a wrongful killing be required to establish that "any" and "all" state remedies are ineffective as a prerequisite to pursuing their § 1983 claims?

PARTIES TO THE PROCEEDINGS

Parties before the Court of Appeals were Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry, as appellants; and Janet Kathleen Wagner, Las Vegas Metro Police Department, State of Nevada, Nevada Highway Patrol, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner, Officer Greg Goen, Sergeant William Adamson, Sergeant Harvey Weatherford, Trooper Joseph A. Smith, Trooper Garth Gardner, Trooper Joseph Wyngard, and Trooper James Brannum, as appellees.

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PETITION FOR WRIT OF CERTIORARI

Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry (the "DeLews") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported and appears in the Appendix at App. 1a to 9a. The opinion of the United States District Court for the District of Nevada is not officially reported. It appears in the Appendix at App. 10a to 12a.

JURISDICTION

The opinion of the Court of Appeals was entered on May 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment, the Fifth Amendment, Section 1 of the Fourteenth Amendment, and Section 2 of Article IV, the United States Constitution; 42 U.S.C. § 1983; and § 484.379 of the Revised Code of the State of Nevada. These are reprinted at App. 13a to 14a.

STATEMENT OF THE CASE

The right to meaningful access to courts is a fundamental right protected by the Constitution, and is one of the "highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Mere technical access is insufficient to satisfy this constitutional right, which guarantees access that is "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 820 (1977). When officials act under color of state law to conceal facts that would form the basis for a cause of action, victims of the cover-up possess cognizable claims under 42 U.S.C. § 1983 for denial of this fundamental right and substantive due process. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967, 975 (5th Cir. 1983).[1]

Police cover-ups prejudice a victim's chances of recovery in state court, cause independent injury separate and apart from the underlying state wrongful act, and themselves constitute constitutional deprivations by interfering with constitutionally protected rights, including the right to meaningful access to courts and substantive due process. *Ryland*, 708 F.2d at 971-74.

The Ninth Circuit below recognized that the DeLews had stated "cognizable" claims under 42 U.S.C. § 1983, but the court nevertheless ordered dismissal of the action without

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[1] The right of meaningful access to the courts finds support in several provisions of the Constitution, including the Due Process Clause of the Fourteenth Amendment, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); the Equal Protection Clause, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); the First Amendment, *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)); and the Privileges and Immunities Clause of Article IV. *See, e.g., Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148(1907); *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990).

prejudice to re-file "if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective." Ninth Circuit Opinion at 9a. This judicially mandated Ninth Circuit practice has no legal basis, statutory or otherwise, and conflicts with Congressional intent, this Court's precedent, and other circuit court authorities. In essence, the Ninth Circuit has cast an additional burden upon § 1983 cover-up victims by requiring them to establish, as a condition precedent to maintaining a § 1983 action, that "all" state remedies on the underlying claims be shown to be "ineffective."

The Ninth Circuit's additional impediment is directly contrary to this Court's long recognized pronouncements that the "principal remedy Congress chose to provide injured persons [under § 1983] was *immediate* access to federal courts," *Felder v. Casey*, 487 U.S. 131, 147 (1988) (emphasis added) (citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 503-04 (1982)), and that cognizable claims "should immediately go forward." *Edwards v. Balisok*, __ U.S. __, 117 S. Ct. 1584, 1589 (1997). Moreover, this Court has stated that any burdening of the remedial purposes of § 1983 such as requiring "civil rights victims to seek compensation from offending state officials before they could assert a federal action in State court" is "utterly inconsistent" with § 1983. *Felder*, 487 U.S. at 149. This petition should be granted to bring the Ninth Circuit in line with the statutory mandate of § 1983, Congressional intent and this Court's and other Circuit court pronouncements.

A. Background

In Las Vegas, the police and their family members "do things the way [they] please," secure in the knowledge that the laws which apply to everyone else do not apply to them. *See McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984).[2] To this end, in the early evening hours of September 27, 1994, Janet Wagner thought nothing of drinking three beers through a straw on an empty stomach, while driving in her red GMC Jimmy truck, and proceeding to speed down a residential road, swerving in and out of her lane of traffic, indifferent to the laws and to others who happened into harm's way.

No one except Janet Wagner will ever know to what direction her attention was turned that evening, but it was not on the road where she was driving. As she sped along, feeling the effects from her beers, she did not notice Erin Rae DeLew on her bicycle, clearly visible on the well-lit, residential road. Erin had no chance to see Mrs. Wagner, who struck Erin with her truck from behind, hurling Erin 60 feet through the air and onto the pavement. The force of the impact caused Erin to suffer profuse bleeding, multiple abrasions, fractures and a massive head wound. Erin was pronounced dead two hours later, at 9:30 p.m., as a result of these injuries.

No matter. Mrs. Wagner simply would call her husband, David Wagner, a police officer with the Las Vegas Metropolitan Police Department ("METRO"), and he would take care of everything. Mrs. Wagner called her husband — not an ambulance — from her car phone while Erin lay bleeding on the pavement, barely breathing. Officer Wagner

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[2] Because the DeLews' complaint was dismissed on a motion to dismiss, the factual allegations of the complaint and all reasonable inferences are to be construed in the light most favorable to the DeLews. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

arrived within minutes. As soon as his fellow officers arrived on the scene, he began orchestrating the cover-up, directing them to do whatever might be best for Mrs. Wagner. First, they moved her away from the scrutinizing public that had gathered on the sidewalk to the protection of a fellow police officer's car. Although she was conveniently sitting in the patrol car, Mrs. Wagner was not asked any questions about what had happened. No one asked her if she had been drinking. Nor was a field sobriety test performed.

By this time the beers were taking their toll on Mrs. Wagner — she needed to use the restroom. So, in the midst of the fatal traffic investigation, two of Officer Wagner's fellow METRO officers drove Mrs. Wagner in their police car to her home so that she could use the restroom and freshen up.

After delaying for nearly two hours, Officer Wagner and his fellow METRO officers decided enough time had passed that they could call in the Nevada Highway Patrol ("NHP") to "investigate" the fatal collision, recognizing that since Mrs. Wagner was the wife of one of their fellow officers, someone might question their objectivity.

They also may have figured enough time had passed that *surely* Mrs. Wagner would have sobered up by the time the NHP arrived. Nevertheless, when a young NHP officer mentioned he smelled alcohol on Mrs. Wagner's breath, Lieutenant Jensen of METRO, the senior officer at the scene, stepped forward and said it was *he* who had been drinking and smelled of alcohol, *not* Mrs. Wagner.

Although calling the NHP bought more time, a blood alcohol test would eventually need to be taken given the observation of the young NHP officer. They needed a different way to disguise Mrs. Wagner's level of intoxication. Accordingly, when Mrs. Wagner's blood draw was finally taken (three hours and fifteen minutes after the collision), they

made sure only *one* blood draw was taken, not two blood draws separated by time as is the normal procedure.

When the results of the blood draw eventually came back, Mrs. Wagner still had a blood alcohol level of .05 — more than three hours after the collision. Yet, having taken only one blood draw and having delayed for more than two hours in conducting the blood draw, the rate of dissipation was forever lost, and the evidence would not be admissible in a criminal trial under Nevada law. Nev. Rev. Stat. § 484.379 (1997). When the DeLews attempted to test independently the remaining blood drawn from Mrs. Wagner, there was an insufficient quantity remaining for any analysis.

Having subverted the most damaging piece of evidence, they proceeded to corrupt the remaining evidence which might implicate Mrs. Wagner. They fabricated the witness statements they chose to take, and failed altogether to take statements from other percipient witnesses. In direct violation of established fatal traffic investigation procedures, they failed to preserve adequately the physical evidence at the scene of the accident — including the skid marks which would have established that it was Mrs. Wagner who recklessly swerved into Erin's right-of-way.

Once the physical evidence had been sufficiently corrupted, they needed to throw Erin's family off track. To this end, they lied to the DeLews and told them it was Erin's fault that she died — that it was Erin who had swerved in front of Mrs. Wagner's car. They falsified the traffic collision report to make it reflect this same falsehood. They lied to and concealed from the Coroner's Office investigator that Mrs. Wagner was driving drunk when she killed Erin. They issued a false police report claiming Erin was responsible for her own death, despite the fact that Mrs. Wagner, the wife of their fellow officer, had been driving drunk, speeding and swerving recklessly. And the cover-up was successful: Janet

Wagner was never arrested — or even cited — for manslaughter for having killed Erin Rae DeLew while driving intoxicated.

B. Procedural Background

In November of 1994, the DeLews filed a wrongful death suit against Janet Wagner in a Nevada court. After evidence of the police cover-up emerged during discovery, the DeLews filed their 42 U.S.C. § 1983 claims in state court. Defendants removed the action to federal court, where on April 3, 1997, the district court judge granted Janet Wagner's motion to dismiss and *sua sponte* dismissed all claims as to all defendants.[3] District Court Order at 12a.

The DeLews appealed. On May 11, 1998, the Ninth Circuit reversed. The Ninth Circuit held that the DeLews had "cognizable" claims under § 1983, but dismissed the action without prejudice stating that the DeLews could re-file their § 1983 action "if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective." Ninth Circuit Opinion at 9a. According to the Ninth Circuit's analysis, such a determination was required and impossible to make until the state wrongful death claim was adjudicated to final judgment. The Ninth Circuit implicitly found that, as a condition of seeking relief under § 1983, victims of police cover-ups must first pursue to final judgment any and all state

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[3] The district court's jurisdiction was based upon 28 U.S.C. § 1331 and § 1343 (1994).

law remedies on the underlying claim and then establish that these remedies were "ineffective" before bringing their § 1983 action.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Requirement That All State Court Remedies Actually Be Rendered Ineffective As A Prerequisite To Maintaining A Cognizable § 1983 Action Has No Legal Support, Is Contrary To § 1983, Congressional Intent And This Court's Precedent, And Conflicts With Other Circuit Court Authorities.

1. The Ninth Circuit's Decision Is Contrary To The Language Of § 1983, Congressional Intent, And This Court's Precedent.

When police officers deliberately and irretrievably destroy crucial evidence, the victims' constitutional rights to meaningful access to courts and due process are infringed. *Bell*, 746 F.2d at 1261-62 (due process clause imposes a duty that state actors "involved in the investigation of a wrong perpetrated by a co-employee under color of state law not conceal the perpetration of that wrong"); *Ryland*, 708 F.2d at 972-73 (determining that plaintiffs had "a substantive constitutional right of access to the courts as well as a property right in the wrongful death action").[4]

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[4] An official police cover-up of the wrongful killing of a citizen's child is the type of egregious governmental conduct that shocks the conscience and is actionable as a violation of substantive due process. *Ryland v. Shapiro*, 708 F.2d 967, 972-73 (5th Cir. 1983); *Webster v. City of Houston*, 689 F.2d 1220, 1239 (5th Cir. 1982) ("It is an unspeakable perversion, however, when the faceless minions of the state, the very ones charged with preventing and investigating murders, have a covert policy of concealing such a crime committed by one of their own") (Goldberg, J.,

Although the Ninth Circuit recognized that the DeLews had stated "cognizable" claims under § 1983 for infringement of their constitutional rights, the court nonetheless dismissed the claim until and unless the DeLews show that "any" and "all" state remedies have been rendered ineffective by the cover-up. The Ninth Circuit's decision to dismiss without prejudice cognizable claims under 42 U.S.C. § 1983 for the cover-up and conspiracy to cover-up the facts surrounding Erin DeLew's death has no legal support, [5] is contrary to the plain mandate of 42 U.S.C. § 1983 and Congressional intent, and conflicts with this Court's and other circuit court authorities.

42 U.S.C. § 1983 itself has no such condition precedent to pursuit of a cognizable claim. Indeed, the statute allows suit for "any" deprivation of a constitutional right without qualification. This Court has recognized on numerous occasions that § 1983 "must be broadly construed" and that it provides a remedy "'against all forms of official violation of federally protected rights.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105-06 (1989) (quoting *Monell v. Department of Social Servs.*, 436 U.S. 658, 700-01 (1978)). Equally important, this Court has long emphasized that the "principal remedy Congress chose to provide injured persons [under § 1983] was *immediate* access to federal courts." *Felder*, 487 U.S. at 147 (emphasis added).

(cont'd.)..
concurring); *see also White v. Rochford*, 592 F.2d 381, 383-85 (7th Cir. 1979).

[5] The Ninth Circuit's decision below rested solely on dicta from a Sixth Circuit case, *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998), which affirmed dismissal because plaintiff had failed to present *any* evidence of the alleged cover-up on a motion for summary judgment, as required under Rule 56, Federal Rules of Civil Procedure.

Like other federal courts, the courts within the Ninth Circuit have an "unflagging obligation" to exercise jurisdiction Congress conferred upon them — especially in cases brought under § 1983. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 203-04 (1988); *Martinez v. City of Newport Beach*, 125 F.3d 777, 781-82 (9th Cir. 1997).

Nor is there any Supreme Court authority requiring a party having cognizable § 1983 claims for a police cover-up of criminal acts to first establish that "all state court remedies be rendered ineffective" on the underlying claim as a prerequisite to prosecuting admittedly cognizable § 1983 claims. As this Court has emphasized time and again,

> [i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked.

Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled in part, Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

This Court recently reaffirmed its commitment to the immediacy principle underlying § 1983 jurisprudence, emphasizing that "a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed." *Edwards*, __ U.S. at __, 117 S. Ct. at 1589. Here, the Ninth Circuit specifically recognized the cognizability of the DeLews' claim, but nonetheless ordered dismissal, completely undermining § 1983, Congressional intent and this Court's precedent.

2. The Ninth Circuit's Practice Conflicts With Other Circuit Court Authorities.

The Ninth Circuit's extraordinary practice of requiring victims of police cover-ups and conspiracies to first adjudicate to final judgment the underlying claim and establish that the police cover-up "actually rendered all state court remedies ineffective" is in conflict with at least three other circuit courts. *See Barrett v. United States*, 689 F.2d 324, 331-32 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983); *Ryland*, 708 F.2d at 974-75; *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985); *Bell*, 746 F.2d at 1261; *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984); *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990); *Nielsen v. Clayton*, 1995 U.S. App. LEXIS 17126, at *1 (7th Cir. July 11, 1995).

In *Bell*, police officers conspired to cover up the true facts of a fellow officer's killing of an innocent man. 746 F.2d at 1215-22. The truth about the killing remained obscured until one of the officers stepped forward. *Id.* at 1223. The Seventh Circuit held constitutional rights are infringed where "police officials shield from the public and the victim's family key facts which would form the basis of the family's claim for redress." *Id.* at 1261. Resolution of the underlying state wrongful death claim, settled earlier through the payment of monies to the Bell family, did not moot the § 1983 claim; the constitutional violation stood on its own. Nor must the cover-up be completely and unambiguously successful — "substantial concealment" is sufficient. *Id.* at 1263, n.72 (holding that § 1983 claim existed for police cover-up despite ambiguities surfacing in news articles and earlier inquest).

Likewise, the Fifth Circuit allows § 1983 cover-up claims to proceed independently of any underlying cause of action without any requirement that the victim first establish that all remedies on the underlying claim be rendered ineffective. *See*

City of Borger, 767 F.2d at 172-73 (implicitly holding no requirement for pursuit of any underlying cause of action as prerequisite for § 1983 claim); *Ryland*, 708 F.2d at 974 (same); *Webster*, 689 F.2d at 1223 (same).

In *Ryland*, the defendants conspired to hide the truth about a wrongful death, and the cover-up resulted in an eleven month delay before the truth emerged. The Fifth Circuit held that the state actors' unlawful conduct

> could have prejudiced the [plaintiffs'] chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses . . . and could well prove more expensive to litigate such action.

708 F.2d at 975-76. The Fifth Circuit does not require that victims first establish in state court that the cover-up "actually rendered all state court remedies ineffective," as a prerequisite to pursuit of their § 1983 cover-up and conspiracy claims.

In *Barrett*, the United States Army caused the wrongful death of an unknowing participant in a chemical warfare experiment, and then concealed the truth. 689 F.2d at 326. The Second Circuit allowed the § 1983 claim to proceed despite the prior recovery on the underlying claim. *Id.* at 332.

In contrast to the Second, Fifth, and Seventh Circuits, the Ninth Circuit holds that victims of police cover-ups must first establish that the cover-up actually rendered "any" and "all" state court remedies ineffective before seeking relief for the separate and independent constitutional violations. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 625 (9th Cir. 1988); *Dooley v. Reiss*, 736 F.2d 1392, 1394-95 (9th Cir.), *cert. denied*, 469 U.S. 1038 (1984). The rationale is that a plaintiff who recovers anything on the underlying claim — no

matter how nominal or difficult to obtain — has suffered no constitutional deprivation due to the deliberate police cover-up. The recovery essentially moots the otherwise cognizable § 1983 violation.

Thus, a victim of a police cover-up can expect one result if the claim is brought in the Ninth Circuit, and a vastly different one if he or she is fortunate enough to be in the Second, Fifth, or Seventh Circuit. Because of the need for uniformity among the courts of appeal, and the elemental importance of deterring state actors from covering up illegal conduct, the Court should grant this petition and resolve this circuit split in favor of allowing victims of unconstitutional conduct to vindicate their rights without a concomitant requirement that they first establish that "any" and "all" state law remedies have proven ineffective.

B. Because The DeLews Suffered Distinct, Cognizable Injuries From The Deliberate Police Cover-Up, Resolution Of The Underlying Claims Necessarily Cannot Afford Adequate And Effective Redress For The Constitutional Violations.

No form of victory in a state court wrongful death action can vindicate the deprivation of the DeLews' constitutional rights or otherwise moot their § 1983 claims. Undeniably, the deliberate destruction of crucial evidence has made it much more difficult and expensive for the DeLews to prove their wrongful death claim and obtain full and complete redress. This increased difficulty and burden alone necessarily has diminished the value of the property right in the underlying claim.

The police conspiracy to protect Officer Wagner's wife cost the DeLews inculpatory and essentially irrefutable evidence of her blood alcohol level at the time of the collision, statements of percipient witnesses, and physical evidence from

the crime scene. The destruction of the alcohol-related evidence by itself all but forecloses the recovery of punitive damages or a finding of 100% fault to Officer Wagner's wife under Nevada's comparative negligence statute. Without this vital evidence, even if the DeLews prevail to some degree on their state wrongful death action, the value of that claim has been reduced. That reduction in value is capable of being quantified today — in much the same way that the state court will quantify the remaining value of the diminished wrongful death claim. Plaintiffs can quantify these injuries today, and should be allowed to do so immediately in their § 1983 claim in federal court.[6]

In *Barrett*, the Second Circuit held that, in addition to the due process property right in a cause of action, plaintiffs also had a right to the recover the diminished value of their claim: the difference between the settlement they agreed to during the cover-up and the compensation they would have received in the absence of the conspiracy. 689 F.2d at 331-32. Regardless of the compensation paid plaintiffs in settlement, they possessed a legitimate claim that the government's

> obstruction of justice in conducting a defense to that action deprived them, not of the whole of their constitutionally protected property consisting of the lawsuit, but only of *a part of that protected property amounting to an increment in its value*.

Id. at 332 (emphasis added).

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[6] Nor is there any requirement that the DeLews show with precision the diminution in value of the underlying claim caused by the official cover-up. *Bell*, 746 F.2d at 1263, n.72. The Seventh Circuit rejected such a rule because it is the substantial official concealment of facts by the involved police officer that "precludes knowledge of the relief plaintiffs otherwise would have obtained." *Id.*

In addition to the decreased value of the property interest in the state cause of action, only the § 1983 claim can compensate the DeLews for the emotional distress resulting from the deliberate cover-up. A constitutional deprivation, such as a conspiracy to deprive citizens of meaningful access to the courts, entitles the victims to damages for emotional distress. *See Carey v. Piphus*, 435 U.S. 247, 264 (1978); *Nielsen*, 1995 U.S. App. LEXIS 17126, at *18; *Bell*, 746 F.2d at 1265-66; *Ryland*, 708 F.2d at 976. This injury is separate and distinct from that caused by Erin's death, and the DeLews should be allowed to proceed immediately to prove and receive compensation for this loss.

Similarly, no amount recovered on the underlying property claim can ever compensate the DeLews for the infringement of their liberty interests caused by the infringement of their rights to meaningful access to court. *See Williams v. Lane*, 851 F.2d 867, 881 (7th Cir. 1988) (holding deprivation of prison inmates' access to courts amounted to denial of liberty interest); *Bell*, 746 F.2d at 1242-47; *Ryland*, 708 F.2d at 971. This separate basis of constitutional infringement cannot be redressed by any available remedy in the state wrongful death action.

Finally, even if the Delews were to recover substantial damages in the state wrongful death action, that would not affect the cognizability of the § 1983 claims. Nominal damages are recoverable for § 1983 violations. *See, e.g., Carey*, 435 U.S. at 266 (deprivation of certain absolute rights actionable for nominal damages in order to recognize "the importance to organized society that those rights be scrupulously observed; . . ."); *Ryland*, 708 F.2d at 976. The potential or actual damages on the two actions are separate and distinct, and the Ninth Circuit should not be allowed to speculate to the contrary as a basis for dismissing and delaying prosecution of the cognizable § 1983 claims.

C. The Ninth Circuit's Decision Encourages Lawless Conduct, Forces Police Cover-Up Victims Into A Costly Litigation Conundrum, Discourages Settlement Or Resolution, And Creates Impossible Problems Of Measuring The Adequacy Of The Remedy Obtained On The Underlying Claim.

The Ninth Circuit's rule creates a costly and legally unsupportable conundrum for police cover-up victims like the DeLews. To earn the opportunity to redress violations of their constitutional rights resulting from police cover-ups or conspiracies, police cover-up victims must establish that "any" and "all" state law remedies for the underlying claims have been rendered "ineffective." In other words, in the Ninth Circuit, police cover-up victims must not only try to final judgment the underlying action, they must then show that any and all remedies obtained were ineffective. Such a requirement amounts to an impermissible burden on § 1983 victims, *Felder*, 487 U.S. at 141, 144-45 ("notice requirement burdens the exercise of the federal right . . ." and impermissibly "conditions the right to bring suit against the very persons and entities Congress intended to subject to liability.") Such a burden was never intended by Congress and is completely contrary to the broad remedial purposes of § 1983. *See Carey*, 435 U.S. at 253-58.

The adverse consequences of such a rule of law cannot be overstated. First, and perhaps most significantly, the Ninth Circuit's rule creates nearly impossible problems in measuring the effectiveness of the underlying remedy. What quantum of success in the underlying lawsuit will be deemed an effective remedy? Who will decide when the remedy is adequate enough? Even if a police cover-up victim prevails in the underlying action, this modicum of success cannot possibly be an accurate reflection of the outcome had no cover-up taken place and no evidence been destroyed. *See Bell* 746 F.2d at 1265, n.72 (holding that there is no requirement that plaintiffs show "exactly what relief plaintiffs would have obtained [on

the underlying claim] had defendants not concealed the truth." . . . "since defendants' concealment of the facts . . . precludes us from knowing what would have happened otherwise . . ."). Allowing the § 1983 claim to proceed contemporaneously with the state action avoids the difficulty of determining and measuring the necessary quantum of success or failure on the underlying claim, and guarantees that the victim's constitutional rights will be vindicated and redressed.

Second, it does nothing to deter or discourage the very conduct Congress sought to curb when it enacted § 1983 — lawless conduct by state actors — particularly law enforcement officers. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey*, 435 U.S. at 254-57) (§ 1983's purpose is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."). Indeed, such a rule encourages police officers in the Ninth Circuit to engage in cover-ups, knowing that victims will be required first to adjudicate to final judgment the underlying claim before having the right to pursue the cover-up or conspiracy claims.

Third, the decision below discourages settlement and resolution of the underlying claim because such settlement may be deemed to be an effective remedy which, according to the Ninth Circuit, would moot the § 1983 claims.

Finally, the Ninth Circuit's rule, which delays indefinitely trial of the § 1983 claims, wholly undermines the "immediacy" principle intended by Congress and emphasized by this Court, subverting the historic intent of § 1983 to provide victims of constitutional deprivations with "immediate access to the federal courts notwithstanding any provision of state law to the contrary." *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 504 (1982). It also compounds the delay and compromises our justice system. As noted by the Fifth Circuit in *Ryland*,

> Delay haunts the administration of justice. . . . The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination.

708 F.2d at 974 (quoting *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980)). It is truly ironic that the Ninth Circuit compounds the initial delay caused by the cover-up, a practice that works to ensure that the truth will remain unknown for at least the duration of the underlying judicial proceeding. With every passing day, the DeLews' chances of vindicating their constitutional rights necessarily diminish.

The Ninth Circuit's practice poses an impossible quandary for § 1983 cover-up victims: to win the opportunity to vindicate their federal rights they must first try to judgment their underlying claim and then convince a second court that whatever remedy is obtained was "ineffective." Under the Ninth Circuit's approach, distinct injuries resulting from the cover-up are never compensated, nor are police given any incentive *not* to conceal their illegal conduct. If the deliberate cover-up fails, the victims must still overcome two hurdles before obtaining the right to vindicate their constitutional rights. If the deceit is successful, it is unlikely that the victims will ever uncover sufficient facts to prevail in either the underlying claim or the § 1983 cover-up claim. Requiring § 1983 cover-up victims to first exhaust "any" and "all" remedies on the underlying claim as a condition precedent to pursuing admittedly cognizable claims amounts to judicial legislation and cannot withstand scrutiny.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW
as Special Administrator of the Estate of Erin Rae DeLew;
H. ROY MAYBERRY; and VICKIE MAYBERRY,
Petitioners,

v.

JANET KATHLEEN WAGNER, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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August 10, 1998

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL C. DELEW; MICHAEL C. DELEW, as Special Administrator of the Estate of Erin Rae Delew; ERIN RAE DELEW, Estate of; H. ROY MAYBERRY; VICKIE MAYBERRY,
Plaintiffs-Appellants,
v.
JANET KATHLEEN WAGNER; LAS VEGAS METRO POLICE DEPARTMENT; STATE OF NEVADA; NEVADA HIGHWAY PATROL; EDWARD JENSEN, Lieutenant; RICHARD WOMACK, Sergeant; CURTIS ALBERT, Sergeant; THOMAS HARMON, Sergeant; RICHARD HART, Detective; WILLIAM JOHNSON, Detective; WILLIAM SMITH, Officer; KEITH BOWERS, Officer; DAVID WAGNER, Officer; GREG GOEN, Officer; WILLIAM ADAMSON, Sergeant; HARVEY WEATHERFORD, Sergeant; JOSEPH A. SMITH, Trooper; GARTH GARDNER, Trooper; JOSEPH WYNGARD, Trooper; JAMES BRANNUM, Trooper,
Defendants-Appellees.

No. 97-15778
D.C. No.
CV-97-00090-PMP
OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
March 12, 1998—San Francisco, California

Filed May 11, 1998

Before: Joseph T. Sneed, Harlington Wood, Jr.,* and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Individual Rights/Civil Rights

The court of appeals reversed a judgment of the district court. The court held that under 42 U.S.C. § 1983, a police cover-up of the facts underlying a tort claim is sufficient to support a federal constitutional claim based on the denial of meaningful access to state courts.

Erin Delew died when her bicycle was struck by a vehicle driven by appellee Janet Wagner. An investigation by officers of appellees Las Vegas Metropolitan Police Department (LVMPD) and the Nevada Highway Patrol (NHP) cleared Wagner.

Appellants Michael Delew and Vickie Mayberry (Delews) sued Wagner for wrongful death in state court. When evidence of a police cover-up came to light, they sought leave to amend their complaint to add a claim under § 1983. The trial court denied their motion and directed the Delews to file a separate § 1983 complaint.

---

* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

The Delews filed a separate § 1983 action in state court against Wagner, LVMPD, NHP, and various individual officers and police officials. The complaint alleged that Wagner, whose husband was a LVMPD officer, and certain named officers covered up and conspired to cover up the true facts surrounding Erin's death; Wagner had operated her vehicle negligently and while under the influence of alcohol; the officers deliberately failed to perform field sobriety and blood-alcohol tests on Wagner; the officers deliberately failed to preserve physical evidence; and the officers allowed Wagner to leave the scene of the accident.

The defendants removed the action to federal court. Wagner moved to dismiss for failure to state a claim.

Although the other defendants had not joined in Wagner's motion, the district court dismissed the action as to all defendants on the ground that the allegations of the complaint failed to provide an independent basis for relief under § 1983. The court dismissed the conspiracy claim on the ground that there was no evidence or allegation that the alleged conspirators violated any cognizable protected right. Alternatively, the court dismissed the complaint on the ground that the Delews had impermissibly split their causes of action by bringing the state wrongful death action and a separate action under § 1983. The Delews appealed.

[1] The Delews alleged a constitutional violation, namely that the defendants violated their right of meaningful access to the courts by covering up the true facts surrounding Erin's death. The right of access to the courts is a fundamental right protected by the Constitution. Denial of meaningful access to the courts is established when a party engages in pre-filing actions that effectively cover up evidence and render any state-court remedy ineffective.

[2] The complaint alleged a cognizable claim under § 1983. To prevail on their claim, the Delews had to

demonstrate that the defendants' cover-up violated their right of access to the courts by rendering any state-court remedy ineffective. However, because the wrongful death action remained pending in state court, it was impossible to determine whether this in fact occurred.

[3] The district court additionally erred by holding that the conspiracy cover-up claim failed to state a claim for relief. Construing the facts in a light most favorable to the Delews, it was reasonable to infer an understanding between Wagner and the officers to cover up the true facts of Erin's death, and thereby deprive the Delews of their right of access to the courts.

[4] The district court should have recognized the cognizability of the Delews' claims and dismissed their complaint without prejudice. The Delews would have had the opportunity to refile their § 1983 action if the alleged cover-up actually rendered all state-court remedies ineffective. [5] The court further erred in ruling that the Delews split their causes of action. The state court effectively split the causes of action by denying the Delews' motion to join the two actions in one proceeding. The rule concerning claim-splitting was not applicable.

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OPINION

SNEED, Circuit Judge:

Plaintiffs Michael C. Delew and H. Roy and Vickie Mayberry ("the Delews")[7] appeal the district court's dismissal of their suit under 42 U.S.C. § 1983. We must decide whether the Delews' complaint states a claim for relief under section 1983. We conclude that it does. We therefore remand with instructions consistent with this opinion.

I.

BACKGROUND

Erin Rae Delew died when her bicycle was struck by a vehicle driven by Janet Kathleen Wagner. An investigation undertaken by the Las Vegas Metropolitan Police Department ("LVMPD") and Nevada Highway Patrol ("NHP") ultimately found that Janet Kathleen Wagner was not the cause of Erin Rae Delew's death. The Delews are not convinced. They allege that Wagner, whose husband is an LVMPD officer, and certain named LVMPD and NHP officers, covered-up and conspired to cover-up the true facts surrounding Erin Rae Delew's death in violation of the Delews' constitutional rights.

In their complaint, the Delews allege that Janet Kathleen Wagner operated her vehicle negligently by driving (1) 30% in excess of the maximum posted speed limit, (2) while under the influence of alcohol, and (3) in violation of the deceased's right-of-way. They further allege that the LVMPD and NHP officers allowed Wagner to leave the scene of the accident during the initial investigation.

---

[7] Michael C. Delew is the deceased's husband. H. Roy and Vickie Mayberry are the deceased's parents.

The Delews further allege that after the LVMPD and NHP officers learned the true facts of Erin Rae Delew's death, they successfully covered-up the true facts by: (1) deliberately refraining from performing a field sobriety test on Wagner; (2) deliberately refraining from performing a chemical blood alcohol test on Wagner within two hours of the fatal accident; (3) deliberately failing to preserve physical evidence such as skid marks and relevant debris; and (4) allowing Wagner to leave the scene of the accident. The defendants flatly deny the allegations.

On November 10, 1994, the Delews filed a wrongful death action against Janet Kathleen Wagner in state court. We are informed that trial is set for February, 1999. After evidence of a cover-up surfaced during the discovery phase, the Delews sought leave to amend their wrongful death action by adding a section 1983 claim. The state court denied the motion and directed the Delews to file a separate section 1983 complaint. While we question the soundness of that decision, we have no power to correct it and must accept the unique posture the Delews' claims appear before us.

On September 26, 1996, the Delews filed their section 1983 action in state court. The defendants removed the case to the district court pursuant to 28 U.S.C. § 1441(a), (b). Immediately thereafter, Janet Kathleen Wagner independently moved to dismiss under Fed. R. Civ. P. 12(b)(6). Despite the failure of the remaining defendants to join the motion, the district court dismissed as to all defendants on the ground that the Delews' allegations failed to provide an independent basis for relief under section 1983. The district court dismissed the Delews' conspiracy claim on the ground that there was no evidence or allegation of evidence that the alleged conspirators infringed upon any cognizable protected right. In the alternative, the court dismissed the entire complaint on the ground that the Delews had impermissibly split their causes of actin by bringing a state wrongful death action and a separate action under section 1983. The Delews appeal these rulings.

II.

JURISDICTION AND STANDARD OF REVIEW

This action fell within the district court's original jurisdiction. *See* 28 U.S.C. §§ 1331, 1343. The judgment of the district court granting dismissal is an appealable final order. *See* 28 U.S.C. § 1291.

We review the district court's order of dismissal under Rule 12(b)(6) de novo. *See Stone v. Travelers Corp.*, 58 F.3d. 434, 436-37 (9th Cir. 1995). We will affirm the district court's order of dismissal only if it appears "beyond doubt" that the Delews can prove no set of facts that would entitle them to relief. *See Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995).

III.

DISCUSSION

The Delews' primary contention on appeal is that the district court erred by dismissing their section 1983 complaint on the ground that they failed to state an independent basis for relief under 42 U.S.C. § 1983.

In order to resolve this issue, we must determine whether the Delews' complaint alleged facts showing a deprivation of a right, privilege or immunity secured by the Constitution or federal law, by one acting under color of state law. *See Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991). Because the district court dismissed under Rule 12(b)(6), we must accept all allegations of material fact as true and construe them in the light most favorable to the Delews. *See Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994).

[1] The Delews have indeed alleged a constitutional violation, namely, that the defendants violated the Delews'

right of meaningful access to the courts by covering up the true facts surrounding Erin Rae Delew's death. The Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution. *See Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). More recently, the Sixth Circuit held that the Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers-up evidence and actually renders any state court remedies ineffective. *See Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998). That court stressed that a "plaintiff cannot merely guess that a state court remedy will be ineffective because of a defendant's actions." *Id.* at 1264.

[2] Applying the Sixth Circuit's reasoning in *Swekel* to the Delews' case, we believe the Delews' complaint alleges a cognizable claim under section 1983.[8] To prevail on their claim, the Delews must demonstrate the defendants' cover-up violated their right of access to the courts by rendering "any available state court remedy ineffective." *See id.* However, because the Delews' wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred.

[3] The district court additionally erred by holding that the Delews' conspiracy cover-up claim failed to state a claim for relief. In support of their conspiracy claim, the Delews allege that Janet Kathleen Wagner left the accident scene during the investigation and that the LVMPD and NHP officers permitted Wagner to do so. Construing these facts in a light

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[8] We reject Wagner's argument that the Delews are precluded form alleging a constitutional violation for conduct occurring after the death of Erin Rae Delew. The victims of the cover-up are the decedent's survivors, not the decedent. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1523 (7th Cir. 1990).

most favorable to the Delews, it is reasonable to infer an understanding between Wagner and the officers to cover-up the true facts of Erin Rae Delew's death and thereby deprive the Delews of their right of access to the courts. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (in order to satisfy color of state law requirement under civil conspiracy theory, plaintiff need only have shown that there was an understanding between civilian and officers to deprive plaintiff of her rights).

[4] We conclude that the district court should have recognized the cognizability of the Delews' claims and dismissed their complaint without prejudice. By disposing of the case in this fashion, the Delews would have the opportunity to re-file their section 1983 action if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective. We therefore remand with instructions to dismiss the Delews' section 1983 complaint without prejudice.

[5] We further conclude that the district court erred in its ruling that the Delews split their causes of action by bringing a state wrongful death action and a separate action under 42 U.S.C. § 1983. The Nevada state court effectively split the Delews' causes of action by denying their motion to join the two actions in one proceeding. The rule concerning claim splitting is not applicable here. *See Smith v. Hutchins*, 93 Nev. 431, 432-33 (1977).

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

MICHAEL C. DELEW, individually, MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY,	)	CV-S-97-090-PMP (LRL)
Plaintiffs,	)	
v.	)	ORDER
JANET KATHLEEN WAGNER, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, STATE OF NEVADA, EX REL., NEVADA HIGHWAY PATROL, LIEUTENANT EDWARD JENSEN, SERGEANT RICHARD WOMACK, SERGEANT CURTIS ALBERT, SERGEANT THOMAS HARMON, DETECTIVE RICHARD HART, DETECTIVE WILLIAM JOHNSON, OFFICER WILLIAM SMITH, OFFICER KEITH BOWERS, OFFICER DAVID WAGNER AND OFFICER GREG GOEN, SERGEANT HARVEY WEATHERFORD, TROOPER JOSEPH A. SMITH, TROOPER GARTH GARDNER, TROOPER JOSEPH WYNGARD AND TROOPER JAMES BRANNUM, DOES I through XX, inclusive, and ROE CORPORATIONS XX through XXX,	)	
Defendants)		

This action was commenced on September 26, 1996, by the filing of Plaintiffs' Complaint in the Eighth Judicial District Court in and for the County of Clark, State of Nevada (#1B). On January 23, 1997, the action was removed from the Eighth Judicial District Court to this Court.

Plaintiffs' action is based upon a fatal accident occurring on September 27, 1994, in which Erin Rae Delew, wife of Plaintiff Michael C. Delew, was struck while riding her bicycle by a vehicle driven by Defendant Janet Kathleen Wagner. Plaintiffs have filed a separate wrongful death action arising from the accident. This case, however, involves two claims for relief. Plaintiffs' first cause of action is for an alleged violation of civil rights under 42 U.S.C. § 1983, and Plaintiffs' second cause of action is for conspiracy to violate 42 U.S.C. § 1983. In essence, Plaintiffs' Complaint is grounded on the claim that Defendants Wagner and various Defendant Officers of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol acted and conspired to act to cover up the true facts of Erin Delew's death to protect Janet Wagner from criminal and civil liability.

On February 10, 1997, Defendants LVMPD, Lt. Edward Jensen, Sgt. Richard Womack, Sgt. Curtis Albert, Sgt. Thomas Harmon, Det. Richard Hart, Det. William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner and Officer Greg Goen filed an Errata to Petition for Removal of Civil Action (#8) which refiled Defendant Janet Wagner's Motion to Dismiss (#8A) originally filed in the Eighth Judicial District Court on January 4, 1997. On March 7, 1997, Plaintiffs filed an Opposition to Defendant's Motion to Dismiss (#14) to which Defendant Replied (#19) on March 17, 1997.

By the Motion to Dismiss, Defendants correctly argue that Plaintiffs cannot split their causes of action by bringing a state wrongful death action and a separate action under 42 U.S.C. § 1983 on the facts alleged in this case. Certainly

Plaintiffs can and have maintained a wrongful death action against Defendant Janet Wagner for the accident which killed Erin Delew. However, that accident does not provide a basis for a lawsuit under 42 U.S.C. § 1983 against Defendant Janet Wagner as a private citizen. To the extent Plaintiffs seek to maintain a § 1983 claim based upon an alleged conspiracy between Defendant Janet Wagner and various officers of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol, Plaintiffs' claim is defective because there is no evidence or allegation of evidence indicating that the actions of the alleged conspirators infringed upon a cognizable protected right of Plaintiffs.

This Court cannot evaluate the extent to which the alleged failure to investigate and/or coverup regarding an investigation may have evidentiary value in Plaintiffs' wrongful death action pending in state court. Suffice it to say, the allegations do not provide an independent basis for Plaintiffs' claims under 42 U.S.C. § 1983.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (#8A) is granted and this action is dismissed as to all Defendants.

DATED: April 3, 1997

s/

PHILIP M. PRO
United States District Judge

CONSTITUTIONAL PROVISIONS

Article IV, Section 2 provides: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States."

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

The Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . "

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Nev. Rev. Stat. § 484.379 (1997) provides, in relevant part:

> It is unlawful for any person who: (a) is under the influence of intoxicating liquor; (b) has 0.10 percent or more by weight of alcohol in his blood; or (c) is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have 0.10 percent or more by weight of alcohol in his blood, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

Supreme Court, U.S.
FILED
OCT 14 1998
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No. 98-276 (2)

In The

Supreme Court of the United States

October Term, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Petitioners,

v.

JANET KATHLEEN WAGNER; LAS VEGAS METROPOLITAN POLICE DEPARTMENT; STATE OF NEVADA, EX REL.; NEVADA HIGHWAY PATROL; LIEUTENANT EDWARD JENSEN; SERGEANT RICHARD WOMACK; SERGEANT CURTIS ALBERT; SERGEANT THOMAS HARMON; DETECTIVE RICHARD HART; DETECTIVE WILLIAM JOHNSON; OFFICER WILLIAM SMITH; OFFICER KEITH BOWERS; OFFICER DAVID WAGNER; OFFICER GREG GOEN; SERGEANT WILLIAM ADAMSON; SERGEANT HARVEY WEATHERFORD; TROOPER JOSEPH A. SMITH; TROOPER GARTH GARDNER; TROOPER JOSEPH WYNGARD; AND TROOPER JAMES BRANNUM,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT LVMPD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. WHETHER THE NINTH CIRCUIT CORRECTLY DECIDED, IN A CASE WHERE THE CONSTITUTIONAL VIOLATION ALLEGEDLY DEALS WITH DELIBERATE POLICE "COVER-UP", THE CAUSE OF ACTION ARISING FROM SUCH EVENTS DOES NOT BECOME RIPE UNTIL IT CAN BE SHOWN THE ACTIONS RESULTED IN MEANINGFUL DENIAL OF ACCESS TO THE COURTS – SUCH AS RENDERING STATE COURT REMEDIES INEFFECTIVE.

PARTIES TO THE PROCEEDING

Respondents do not disagree with the characterization of the parties to this proceeding identified in the Petition for Writ of Certiorari.[1] For the purposes of this Opposing Brief, Michael C. Delew, Vickie Mayberry and H. Roy Mayberry will be monickered "DELEWS".

Respondents Las Vegas Metropolitan Police Department; Lieutenant Edward Jensen; Sergeant Richard Womack; Sergeant Curtis Albert; Sergeant Thomas Harmon; Detective Richard Hart; Detective William Johnson; Officer William Smith; Officer Keith Bowers; Officer David Wagner; and Officer Greg Goen, will hereinafter be collectively referred to as "LVMPD".

Respondent Janet Kathleen Wagner will hereinafter be referred to as "WAGNER". Respondents State of Nevada, ex rel.; Nevada Highway Patrol; Sergeant William Adamson; Sergeant Harvey Weatherford; Trooper Joseph A. Smith; Trooper Garth Gardner; Trooper Joseph Wyngard; and Trooper James Brannum will hereinafter be collectively referred to as "NHP".

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[1] Respondent would bring to this Court's attention that DELEWS are also Cross-Respondents in this action by way of the Conditional Cross-Petition for Writ of Certiorari filed by the LVMPD on September 14, 1998.

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JURISDICTION

On April 4, 1997, the Honorable Phillip M. Pro of the United States District Court for the District of Nevada entered and served an Order which dismissed Petitioners' litigation in its entirety.[2]

Thereafter, this matter was timely brought before the Ninth Circuit Court of Appeals and was subjected to its briefing schedule. After considering the briefs and hearing oral argument on the matter, the Ninth Circuit issued its opinion – reversing the decision of Judge Pro. *See Petitioners' Appendix beginning at p. 1a.* The Opinion did not, however, reach the merits of the case. Instead, it dismissed the litigation without prejudice – believing the federal claims were unripe until the pending State court litigation had concluded.

That Order was issued on May 11, 1998. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). LVMPD concedes jurisdiction is found pursuant to Supreme Court Rule 13(1) and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

LVMPD concedes Petitioners' Complaint alleged violations of the constitutional provisions identified in the Petition for Writ of Certiorari.

[2] A complete copy of this Order is found in Petitioners' Appendix beginning at page 10a.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 10, 1994, Michael Delew filed State Court litigation against WAGNER in the Eighth Judicial District Court in Clark County, Nevada. That litigation averred WAGNER had negligently operated her vehicle while under the influence of alcohol in such a manner as to cause the death of Erin Rae Delew. The Complaint was amended to include Petitioners H. Roy Mayberry and Vickie Mayberry as parties-Plaintiff. The causes of action and claims for relief remained the same.

After prodigious discovery had been conducted, in the State Court litigation, on September 18, 1996 on the eve of trial, Petitioners attempted to amend the Complaint – broadening its claim for relief from the wrongful death action to include civil rights claims against LVMPD and NHP. In addition, WAGNER was alleged to have been involved in these civil rights violations. WAGNER opposed expanding the litigation at that late date.

On September 24, 1996, WAGNER and DELEWS appeared before the State Court judge to whom the case was assigned. The Judge determined, since DELEWS had not filed the litigation against all of the proposed defendants at the outset (or even as discovery progressed), to bring in new claims when the litigation was on the eve of trial would be unduly prejudicial. Immediately thereafter, DELEWS filed a second Complaint in the State Court containing the exact same Defendants and allegations but divesting itself of the state wrongful death claims. Upon being served with the Complaint, LVMPD removed the matter to the United States District Court for the District

of Nevada on January 23, 1997. WAGNER's initial appearance in the federal litigation was in the form of a Motion to Dismiss filed on February 10, 1997.[3] Her Motion argued no 42 U.S.C. § 1983 cause of action could exist due to the fact a constitutional right to police investigations did not exist under extant law. She further argued there was no evidence for a conspiracy and that Petitioners were attempting to wrongfully split their cause of action.

The Honorable Judge Phillip M. Pro issued an Order on April 4, 1997 addressing the Motion to Dismiss and dismissing the litigation in its entirety.[4] Noting the action was commenced on September 26, 1996, Judge Pro accurately described the action as one based on a fatal accident occurring September 27, 1994 wherein Ms. Delew was struck while riding her bicycle by a vehicle driven by WAGNER. He held DELEWS were not allowed to split the causes of action by bringing a state wrongful death action and a separate 42 U.S.C. § 1983 action on the facts alleged in the case. The accident, alone, failed to provide a basis for lawsuit under 42 U.S.C. § 1983 against WAGNER as a private citizen. To the extent the litigation attempted to bring in NHP and LVMPD as conspirators with WAGNER to violate the constitutional rights of the decedent, he asserted the claim was defective because there was no allegation of evidence indicating the actions of the alleged conspirators infringed upon any cognizable, protected right of Petitioners. Accordingly, the litigation was dismissed in its entirety.

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[3] Two separate Answers were filed on behalf of LVMPD and NHP.

[4] This Order is attached to the Petitioners' Appendix beginning at p. 10a.

On April 21, 1997, this matter was appealed to the Ninth Circuit Court of Appeals. After briefing and oral argument, the Ninth Circuit issued its Order on May 11, 1998.[5] In that Order, the Ninth Circuit believed a potential constitutional violation for interference with Petitioners' meaningful access to the courts could arise from a simple automobile accident.

Under the procedural posture of this case, however, the Ninth Circuit properly held that, assuming a claim for unconstitutional cover-up investigation can be made, such a cause of action is not ripe until a party has been denied "meaningful access" to the state court. Since that issue has yet to fully unfold, it is simply premature to bring litigation which challenges that the alleged cover-up investigation impaired their access to the Court. Obviously, if Petitioners are successful at the State Court level, then – despite any efforts to allegedly cover-up any wrongful conduct – no constitutional rights would have been violated. There is, therefore, no reason for this Court to act to destroy the Ninth Circuit's decision in this specific regard.[6]

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[5] The complete text of this opinion is found at Petitioners' Appendix beginning at p. 1a.

[6] As the Court will notice, however, LVMPD disagree with the validity of the Order itself so far as it implicates a constitutional cover-up violation could have taken place. That issue is more fully developed in the Conditional Cross-Petition for Writ of Certiorari which LVMPD filed with this Court on September 14, 1998.

B. STATEMENT OF FACTS

Setting aside, for the moment, the unsupported histrionics contained in DELEWS' factual statement, it is respectfully submitted there are only a few sources to which this Honorable Court may go in determining the basal facts of the litigation. They are DELEWS' Complaint which was ultimately dismissed by Judge Pro, and the arguments and exhibits found in WAGNER's Motion to Dismiss (and its resultant progeny). Reviewing those documents reveals a "factual" scenario for this Court to use as the canvas upon which its legal decisions may be properly based.

On December 27, 1994, at approximately 7:15 p.m., Erin Rae Delew was riding her bicycle in the vicinity of West Lake Mead Boulevard and Ridgemore Street in Las Vegas, Nevada. *LVMPD Respondents' Supplemental Appendix ("SA") 5 at ¶ 13.* The Complaint asserts WAGNER was also operating a vehicle in the area and was, at that time, operating the vehicle at an excessive speed while under the influence of alcohol. *Id.* at ¶¶ 16-17. WAGNER is alleged to have caused her vehicle to collide with the bicycle – causing Erin Rae Delew to be projected approximately 60 feet from the point of impact and ultimately causing her death. *Id.* at ¶ 15.[7]

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[7] The independent statement by Susie Olsen indicated she saw a woman on a dark bike without strobe or lights swerving quite a bit because she was attempting to negotiate turning across the street and had a bag of groceries she was carrying. *SA 37-39. Ms. Delew apparently also had a headset on. Id.* Ms. Olsen believed WAGNER was unable to see the bicyclist because it was too dark, the road was curving, and trees blocked

At the time of the accident, Lt. Colonel Robert A. McNeese was in the area and ran to the scene. *SA 23-25.* Upon arriving at the scene, he immediately went to the victim and was unable to find a pulse, identify breathing, or hear a heart beat. *SA 33-34.* At the same time – before the police and ambulance arrived – a doctor arrived at the scene and confirmed Ms. Delew was dead. *SA 35.* A patrolman who arrived also felt for a pulse and thought she was dead. *SA 35-36.* Before any other police appeared, an ambulance arrived and the paramedics therein verified Ms. Delew was dead. *SA 36-37.*

After this, additional LVMPD police officers arrived; NHP was contacted and arrived to conduct the investigation. Petitioners claim the subsequent investigation of the accident, including the procurement of an independent witness statement by one Susie S. Olsen *(SA 37-39)* was designed to "cover up" wrongful activities of WAGNER; and, by so doing, deprived Petitioners of access to the Courts; the right to petition the government for redress of grievances under the First Amendment; the right to prosecute wrongful deaths without impairment or interference; and the right to have a fair and impartial investigation of a death. *See SA 11-13 at ¶ 29(a)-(h).*

Sometime after the accident, WAGNER called her husband. *SA 41-42.* When her husband arrived many minutes later, she was unclear whether other officers or even paramedics had arrived. *SA 42, 44.*

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her vision. *Id.* Apparently, the bicycle swerved in front of WAGNER's vehicle immediately before the impact.

WAGNER testified no officer attempted to separate her from the scene of the collision or to segregate her from other people at the scene. *SA 44-45.* Approximately an hour or so after the accident, she was asked to give a statement. *SA 45.* She was given a field sobriety test (HGN). *SA 69-70.* The result of that test, however, was (in the words of NHP Officer Smith) negative "as far as the six clues or points that you look for. . . . " *Id.* During this time, WAGNER needed to use the restroom and was driven home so she could do that. *SA 49-50.* As a result of the exculpatory statement of Ms. Olsen, the negative results of the field sobriety test, and NHP's investigation, WAGNER was not cited for the death of Ms. Delew.

The remainder of the "factual allegations" and assertions in the Petition for Writ of Certiorari may be plainly seen by this Court – upon review of the record – to be little more than gross speculation and conjecture. Certainly there was nothing in the Complaint nor in the evidentiary record before Judge Pro which supported the lurid and psycho-historical "factual" reconstruction DELEWS portray. This is simply an accident involving WAGNER and Ms. Delew. There is nothing supporting the fraudulent assertions that, somehow, NHP or LVMPD was involved in any cover-up.

Moreover, there was simply no evidence adduced that state court could not vindicate Petitioners' alleged interest in punishing WAGNER (assuming their view of the facts is true). In the pending state court litigation DELEWS are allowed to cross-examine the investigating officers, bring up any inconsistencies they believe existed in the investigation, and set forth all of the evidence in

their possession that WAGNER had, in fact, been drinking that evening and was the primary cause of the fatal accident. They have not been denied the opportunity of filing a suit, conducting discovery, or being able to present evidence in this regard. As it presently stands, Petitioners can prevail in their state court litigation (assuming their contentions about WAGNER's culpability are correct). By the same token, a jury – having considered all of the relevant evidence – may well conclude WAGNER did nothing wrong.

The Circuit's primary concern was that before the litigation could be ripe, Petitioners had to show they were somehow denied meaningful access to the courts or a fair opportunity to have their grievances redressed in state court – based solely upon the actions of LVMPD and NHP in conducting their subsequent investigation into the accident itself. In this regard, their decision was consistent with the posture assumed by this Court on other issues and the majority of other Circuits deciding this very matter.

LEGAL ARGUMENT

Initially, LVMPD strongly disagrees with the Ninth Circuit's decision that, under the peculiar facts of this case, DELEWS stated a "cognizable" claim under § 1983. In fact, as Petitioners' own cited cases specifically indicate, cover-up conspiracies only apply in the investigation of a wrong perpetrated by a co-employee under color of state law or under a wrongful investigation of an injury perpetrated by a co-employee acting under color of

state law. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1261-62 (7th Cir. 1984); *see Webster v. City of Houston*, 689 F.2d 1220, 1239 (5th Cir. 1982).[8] Assuming arguendo this Court believes a potential § 1983 violation could exist under the peculiar facts of this case, it is clear the decision of the Ninth Circuit was absolutely correct.

I. NO LITIGATION CAN BE BROUGHT BEFORE IT IS RIPE

This Court has held, for well over ninety (90) years, that the right of access to the courts is a fundamental right protected by the Constitution of the United States. *See Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). While it is true 42 U.S.C. § 1983 provides no condition precedent to pursuing cognizable claims and is broadly construed to provide a remedy against all forms of official violation of federally protected rights, it is not accurate to state that any claim which could potentially fall under the auspices of 42 U.S.C. § 1983 can be brought at any time a plaintiff desires.

DELEWS argue the absence of "timing" language in 42 U.S.C. § 1983 somehow renders the decision ineffectual. This analysis – albeit simplistic – grossly fails to understand the core requirements necessary for any cause of action (under 42 U.S.C. § 1983 or otherwise). Indeed, were Petitioners' argument to be carried to its logical conclusion, statutes of limitations would have no effect

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[8] This contention, however, has been addressed with the Conditional Cross-Petition which is on file with this Honorable Court and will not be examined in depth here.

on 42 U.S.C. § 1983 causes of action because the statute itself contains no such language regarding same. Yet, it is an undeniable fact that statutes of limitation have long been respected as fundamental to a well-ordered judicial system. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Hawkins v. Joshua Barney's Lessee*, 5 Pet. (30 U.S.) 457, 466 (1831). In fact, this court specifically noted – in the case of 42 U.S.C. § 1983 – even though because Congress did not state a limitations period existed, its existence was always implied. *Felder v. Casey*, 487 U.S. 131 (1988).

Just as a statute of limitations is a crucial element of a well-ordered judicial system, so likewise the concept of "ripeness" underlies the ability to bring forth any claim. This concept is designed to ensure, at the time the judiciary has the case under consideration, the required elements necessary to establish both the existence of the constitutional violation and the presence of damages are extant. This Court has specifically noted the ripeness doctrine is drawn from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n. 18 (1993).

Ripeness requires the court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties in withholding court consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed

may not occur at all." *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 581 (1985).[9]

For a ripe "case or controversy" to exist, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The requisite injury needs to be "distinct and palpable." *Warth v. Selden*, 422 U.S. 490, 501 (1975). It is insufficient to allege an abstract injury. *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974).[10]

"Ripeness is peculiarly a question of timing." *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). The inquiry as to ripeness of a case for federal court action contains both constitutional and prudential components. *Portman v. County of Santa*

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[9] For example, in the context of a takings claim, such a claim is not ripe for review until the litigant has used the administrative procedures available and been denied just compensation. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985); *McKenzie v. City of Whitehall*, 112 F.3d 313, 317 (8th Cir. 1997). "While there is no requirement that administrative remedies be exhausted in cases brought under 42 U.S.C. § 1983 . . . the claim must be ripe, and not moot, to be reviewed properly." *McCabe v. Arave*, 827 F.2d 634, 639 (9th Cir. 1987).

[10] In many ways, the ripeness doctrine is related to the "standing" doctrine. It requires the plaintiff to demonstrate that (1) it will sustain injury from the challenged action, (2) the injury would be redressed by the relief requested, and (3) the court's ability to resolve the issues presented would not be advanced by waiting until the uncompleted event occurs. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978).

Clara, 995 F.2d 989 (9th Cir. 1993). The constitutional component focuses on whether there is sufficient injury while the prudential component focuses on whether there is adequate record on which to base effective review. *Id.* Its rationale is to prevent courts, through avoidance of premature adjudication, from entangling them in abstract disagreements.[11]

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[11] This Honorable Court has recently held a § 1983 action "must always and everywhere be available." *Spencer v. Kemna*, ___ U.S. ___, 118 S. Ct. 978 (1998). However, this does not constitute a derogation of "ripeness" principle. In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court applied elements of tort law in determining when a cause of action was *ripe*. Citing prior decisions, it noted 42 U.S.C. § 1983 creates a species of tort liability. 512 U.S. at 483.

> [O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for the recovery, provide the appropriate starting point for the inquiry under § 1983 as well.

Id. (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)). Accordingly, it first looked to the common law of torts to determine whether there would be a bar to the litigation brought before it. *Id.* Determining that every element necessary to establish a civil tort action was not present in that case (dealing with wrongful conviction claims), this Court held a claim for damages bearing a relationship to a conviction or sentence that has not been invalidated is not cognizable and would not be recognized under 42 U.S.C. § 1983. 512 U.S. at 487.

Thus, merely because 42 U.S.C. § 1983 does not discuss concepts of ripeness, DELEWS err in arguing to this Court that such concepts do not apply in this litigation. Clearly they do. The only question, therefore, is whether the Ninth Circuit correctly applied this concept in determining when an alleged constitutional violation predicated upon allegations of wrongful cover-up activities becomes "ripe". It is respectfully submitted, to the extent the facts before this Court can establish such a violation, the Ninth Circuit gauged that timing correctly.

II. A "COVER-UP" CONSTITUTIONAL VIOLATION CANNOT TAKE PLACE UNTIL THE UNDERLYING STATE LAW CLAIM (IF ONE IS FILED) IS RESOLVED

It cannot be gainsaid Petitioners have already filed a proceeding in state court to persecute WAGNER for the allegedly wrongful death of Ms. DELEW. They have conducted an immense amount of discovery, have had access to police reports (including the identification of all witnesses known at the scene) and have had the opportunity to take depositions of all persons they deemed relevant to the case. They have accessed the medical records regarding WAGNER and have her own statements regarding her behavior that evening. They have records of the physical evidence collected at the time of the investigation. Thus, they have not been denied the ability to factually investigate the events surrounding the death of Ms. DELEW or to file a claim based on their belief as to what "really" happened.

Within this context, the Ninth Circuit has consistently held *if* a plaintiff, on a cover-up allegation claim, succeeds in state court then the cover-up allegations are mooted. *Dooley v. Reiss*, 736 F.2d 1392, 1394-95 (9th Cir.), *cert. denied*, 469 U.S. 1038 (1984).[12] *Cf. Landrigan v. City of Warwick*, 628 F.2d 736, 742 (1st Cir. 1980) (dismissing § 1983 claim alleging cover-up where plaintiff had in fact prevailed in previous state court action). In *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 625 (9th Cir. 1980), the Circuit specifically held – because the ultimate resolution of a state court litigation had not been finalized – a claim for cover-up conspiracy was not ripe for judicial consideration. Accordingly, while dismissal was appropriate, that dismissal should be without prejudice.

Despite Petitioners' protestations to the contrary, there is a strong line of reasoning supporting the concept that the ability to file the litigation seriously limits the claim of any "cover-up" interfering with the parties' *meaningful* access to the courts. In *Lewis v. Casey*, 116 S. Ct. 2174 (1996), this Court reaffirmed a constitutional prerequisite to prevailing on a "denial of access" claim is that the plaintiff establish *actual* injury. In the context of *Lewis*, this Court specifically noted an actual injury could exist *only* if the party could demonstrate a non-frivolous legal claim had been frustrated or was being impeded. 116

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[12] Thus, this Court has already had the opportunity to consider this precise issue emanating from the Ninth Circuit and has declined to exercise its jurisdiction for certiorari. It is submitted the instant situation is not different and, therefore, certiorari should be denied.

S. Ct. at 2180-81. This Court further noted the constitutional right to access to the Court does not extend to enable a plaintiff to discover grievances or litigate effectively once in court. *Id. See also Bounds v. Smith,* 430 U.S. 817 (1977). Thus, the Ninth Circuit decision in this regard simply conforms with the pronouncements of this august body that an actual injury be established by showing the court that a non-frivolous legal claim had been frustrated or was being impeded. The decision by the Ninth Circuit is, at this early date, that actual injury is impossible to establish. Therefore, the matter is not yet ripe for consideration.

Petitioners claim their access to the court was denied and that the state judicial process does not allow them to remedy the wrong alleged. However, *proof* of a lack of adequate state remedies is required by *Hudson v. Palmer,* 468 U.S. 517 (1984), in procedural due process and judicial access cases. Obviously, the federal "right of access to the courts" is not abridged when state court remains just as open to provide a remedy as the federal courts. *See Foster v. City of Lake Jackson,* 28 F.3d 425, 430 (5th Cir. 1994).

III. THE MAJORITY OF CIRCUITS CORRECTLY AGREE WITH THE NINTH CIRCUIT

This same concept was clearly understood by the Fifth Circuit in *Ryland v. Shapiro,* 708 F.2d 967, 974 (5th Cir. 1983). That decision limited the "interference" associated with an alleged "cover-up" to the filing of a complaint. This position was recently reasserted in *Foster,* 28 F.3d at 430 n. 7. The Seventh Circuit reached a similar

conclusion in *Thompson v. Boggs*, 33 F.3d at 847, 852-53 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995), where it held the actions did not amount to denial of right of access to the courts because the plaintiff had sufficient facts to properly file a lawsuit.[13] Likewise, in *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995), the Court found there was no constitutional injury where the plaintiff did not claim to have been prevented from pursuing the tort action, or could not prove the value of that action was reduced by the cover-up. In *Waller v. Butkovich*, 584 F. Supp. 909 (M.D.N.C. 1984), the Court – addressing the effect of a "cover-up" – stated:

> The plaintiffs have great difficulty in proving that they were damaged significantly in these respects. The very fact that they were able to institute this suit goes a long way toward proving the conspiracy to prevent them from obtaining legal redress was unsuccessful, if indeed, there was such a conspiracy. The plaintiffs, of course, were not entitled to have the defendants do investigatory work for them, nor to have the defendants notify them of the existence of a cause of action.

584 F. Supp. at 941.

In *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998), the Sixth Circuit identified the steps to be taken in analyzing whether an individual's fundamental right of access to the courts has been violated. Initially, the court must determine whether

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[13] Again, as with the prior Ninth Circuit case, this Honorable Court had a chance to consider these issues on a Writ of Certiorari and has denied them.

the abuse occurred pre- or post-filing. 119 F.3d at 1263. If pre-filing (as is the situation here), the "plaintiff must establish that the abuse denied her 'effective' and 'meaningful' access to the courts." *Id.* This fact can only be established by showing the actions of the defendants foreclosed her from filing a suit in state court or rendered ineffective any state court remedy she previously may have had. *Id.* at 1264.

In this case, the Ninth Circuit Court of Appeals made the reasoned decision that, assuming a claim for "cover-up" conspiracy could be established, it would have to be done in the context of an impairment to the state law proceeding. Since DELEWS have not been impaired at the present time in the course of their state law proceeding, they have not yet suffered an injury.

As noted, the basic purpose of a § 1983 damages award is to compensate persons for injuries caused by deprivations of constitutional rights. When a person seeks damages, the level of damages is ordinarily determined according to principles derived from the common law of torts. *Memphis Community School District v. Stachura*, 477 U.S. 299, 306 (1986). Accordingly, plaintiffs seeking relief must establish both causation and damages. *Myers v. Scott County*, 868 F.2d 1017 (9th Cir. 1989).

With respect to recovery of damages, in order to justify a monetary judgment, the amount would reflect the substance of damages – as proved by substantial evidence. In other words, the law does not permit arriving at monetary award of damages by pure conjecture. *Kelly Broadcasting Co., Inc. v. Sovereign Broadcast, Inc.*, 96 Nev. 188, 606 P.2d 1089 (1980). *See Butler v. Dowd*, 979 F.2d

661 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993). In Nevada, "where damage has not been sustained or where it is too early to know whether damage has been sustained" an action for damages is premature and should be dismissed. *Semenza v. Nevada Medical Liability Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988). Causes of actions do not accrue until damages are certain and not contingent. *Id. See also Alper v. Stillings*, 80 Nev. 84, 86-87, 389 P.2d 239, 240 (1964).

In the instant case, DELEWS have already been allowed to file their lawsuit. They have access to the court – *meaningful* access to the court at the present time. At best, the rather pallid arguments regarding a lessening of the damage amount they would ultimately be capable of receiving is ambiguous and can only be resolved at the conclusion of trial.[14]

Of course, in this case, WAGNER is virtually impecunious and has, as her only meaningful asset, a vehicular insurance policy. It is LVMPD's understanding that, in the course of the state law proceeding, the full amount of that policy has already been tendered in an attempt to resolve that litigation. Arguably, an award in excess of that insurance policy amount would still be a greater award than that which Petitioners could ever hope to receive from

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[14] Of course, this argument raises the interesting question that since Petitioners have the ability and the opportunity to challenge the veracity of the investigating officers and WAGNER, herself, at the time of the state law trial, a decision by the state law court that the officers and Ms. WAGNER are being truthful would appear to be fatal to Petitioners' claim.

WAGNER. This fact further destroys the validity of Petitioners' claims. Therefore, dismissal without prejudice was completely appropriate.

IV. DELEWS' CITED CASES ARE INAPPOSITE

As already indicated to this Court, other Circuits – such as the Fifth, Sixth, and Seventh, agree with the position taken by the Ninth Circuit that "meaningful access" to the courts requires more than simple lip service. In order to support their contention the Ninth Circuit ruling is contrary to established precedent, Petitioners misstate the holding of *Bell*.[15]

In *Bell*, it was alleged that officers had engaged in a subsequent cover-up to hide the true facts of the murder of a private citizen. The state action ended in a mistrial and was ultimately settled between the parties. Roughly twenty (20) years thereafter, one of the police officers involved in the cover-up confessed to what actually occurred. Immediately another wrongful death action was brought. The problem in *Bell* was that the officers were directly involved in the death of the individual and, therefore, were the only witnesses to the event. Thus, by their own efforts, they could completely foreclose investigation. None of those facts are operative here.

By the same token, Petitioners miscite *Ryland*. In that case, the cover-up of crucial information resulted in the

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[15] In citing *Bell*, Petitioners ignore the more recent Seventh Circuit case already cited to this Court of *Thompson* which sustains the Ninth Circuit's decision. Therefore, the application of *Bell* in making this decision is highly suspect.

state court litigation being dismissed for failure to present sufficient evidence. Again, that case is inapposite to the facts before this Court.

Even if these two decisions were applicable to the case at bar, the analysis underlying those decisions is flawed. This violation occurs only when parties have conspired to act in a manner so as to disguise or so as to keep the victim, or the victim's family, from discovering the "true" facts of the event for which the plaintiff is ultimately seeking relief. However, even the best laid conspiracy is of no avail unless it effectively forecloses that avenue of redress. Until some damage can be shown (such as the inability to file a lawsuit within an applicable statute of limitations, the wrongful imposition of criminal charges upon an innocent party, or the inability to recover monies from litigation based solely on the lies of the conspirators) then the aims of the conspiracy have not been realized and, therefore, a *constitutional* cause of action for conspiracy is simply not yet ripe for adjudication.

CONCLUSION

For the foregoing reasons, LVMPD Respondents respectfully requests this Court deny Petitioners' Petition for Writ of Certiorari and allow the Ninth Circuit decision to stand – to the extent it does not wish to reconsider the Ninth Circuit's position in light of the pending Conditional Cross-Petition for Writ of Certiorari.

Respectfully submitted this 14th day of October, 1998.

RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX

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APPENDIX

COMP
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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY, Plaintiffs, vs. JANET KATHLEEN WAGNER, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, STATE OF NEVADA, EX REL., NEVADA HIGHWAY PATROL, LIEUTENANT EDWARD JENSEN, SERGEANT RICHARD WOMACK, SERGEANT CURTIS ALBERT, SERGEANT THOMAS HARMON, DETECTIVE RICHARD HART, DETECTIVE WILLIAM JOHNSON, OFFICER WILLIAM SMITH, OFFICER KEITH BOWERS, OFFICER DAVID	CASE NO. A364616 DEPT NO. II DOCKET NO. D COMPLAINT (Filed Sep. 26, 1996)

WAGNER AND OFFICER GREG)
GOEN, SERGEANT WILLIAM)
ADAMSON, SERGEANT HARVEY)
WEATHERFORD, TROOPER)
JOSEPH A. SMITH, TROOPER)
GARTH GARDNER, TROOPER)
JOSEPH WYNGARD AND)
TROOPER JAMES BRANNUM.)
DOES I through XX inclusive, and)
ROE CORPORATIONS XX through)
XXX.)
Defendants.)
)

COMES NOW the above-captioned Plaintiffs, by and through their attorneys, and for causes of actions against the above-captioned Defendants allege as follows:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

A. PARTIES

1. Plaintiff Michael C. DeLew is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

2. Plaintiff Michael C. DeLew is the husband of Erin Rae DeLew and was appointed by the Court to serve as the Special Administrator of the Estate of Erin Rae DeLew on November 10, 1994.

3. Plaintiff H. Roy Mayberry is the father of Erin Rae DeLew and is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

4. Plaintiff Vickie Mayberry is the mother of Erin Rae DeLew and is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

5. Defendant Janet Kathleen Wagner is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

6. Defendant Las Vegas Metropolitan Police Department was created pursuant to NRS 280.010 *et seq* as a merged police department of the City of Las Vegas and Clark County. NRS 280.280.4 provides that Department may sue or be sued with regard to any act or omission to act on the part of the sheriff, or an officer, employee or agent of the Department.

7. The Nevada Highway Patrol was created by the Nevada legislature in NRS. 481-130 as a division within the State of Nevada Department of Motor Vehicles.

8. Defendants Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner and Officer Greg Goen are police officers of the Las Vegas Metropolitan Police Department and believed to be residents of Clark County, Nevada.

9. Defendants Sergeant William Adamson, Sergeant Harvey Weatherford, Officer Joseph A. Smith, Officer Garth Gardner, Trooper Joseph Wyngard and Trooper James Brannum are law enforcement officers of the Nevada Highway Patrol and believed to be residents of Clark County, Nevada.

10. At all times mentioned herein Defendant Las Vegas Metropolitan Police Department was a municipal corporation of the State of Nevada, and was the employer of Defendants Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner and Officer Greg Goen and provided each of these Defendants with an official badge and identification card which designated and described its bearer as a police officer of the Las Vegas Metropolitan Police Department. The City of Las Vegas is the municipal corporation in whose name the individual police officer Defendants, and each of them, performed all acts and omissions alleged here.

11. At all times mentioned herein Defendant Nevada Highway Patrol was a municipal corporation of the State of Nevada, and was the employer of Defendants Sergeant William Adamson, Sergeant Harvey Weatherford, Officer Joseph A. Smith, Officer Garth Gardner, Trooper Joseph Wyngard and Trooper James Brannum and provided each of these Defendants with an official badge and identification card which designated and described its bearer as a officer of the Nevada Highway Patrol. The Nevada Highway Patrol is a municipal corporation in whose name the individual police officer Defendants, and each of them, performed all acts and omissions alleged herein.

12. DOES I through XX, inclusive, and ROE Corporations XX through XXX are named as Defendants for individual parties or corporations/partnerships that may be identified during the course of this action. Specifically

there may be additional Metropolitan Police Officers or Highway Patrol Troopers, or agents or representatives or theirs who may have come in contact with evidence or witnesses and thereafter participated in covering up the facts. Upon such occasions, Plaintiffs shall seek leave of the Court to substitute such party or corporation/partnership for the DOES or ROE Defendants.

B. FACTUAL ALLEGATIONS

13. On September 27, 1994 at approximately 7:15 p.m., Erin Rae DeLew, who was married to Plaintiff, Michael C. DeLew, was riding her bicycle in the vicinity of West Lake Mead Boulevard and Ridgemoor Street.

14. At the same time referenced above, the Defendant, Janet Kathleen Wagner, was operating a motor vehicle registered in her husband's name in the same vicinity as referenced above.

15. Janet Kathleen Wagner caused the vehicle that she was operating to collide with Erin Rae DeLew and her bicycle, causing Erin Rae DeLew to be projected approximately sixty (60) feet from the point of impact inflicting numerous lacerations, contusions, and head injuries, upon her, and causing her death.

16. At the time of the subject accident, Janet Kathleen Wagner was operating her vehicle in a reckless and negligent fashion, including, but not limited to, driving her vehicle at a minimum of thirty (30%) percent higher than the maximum posted speed limit.

17. At the time of the subject accident, Janet Kathleen Wagner was operating her vehicle after having

willfully and negligently consumed alcohol and was illegally under the influence of alcohol at the time of the subject accident.

18. After the traffic collision between Erin DeLew and Defendant Janet Wagner, no fewer than 15 law enforcement officers of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol responded to the scene of the fatal investigation, some within a few minutes of the collision and prior to Erin DeLew's death.

19. Immediately upon their arrival at the scene of the collision, and prior to Erin Delew's death, Defendant METRO and NHP officers realized that Defendant Officer David Wagner's wife, Defendant Janet Wagner, had been drinking alcoholic beverages, had been driving her vehicle at speeds in excess of 30% of the posted speed limit, and had violated the right-of-way of Erin DeLew causing Erin DeLew's death. Defendant police officers realized that Plaintiffs' daughter and wife, respectively, was fatally injured.

20. Officer Wagner's wife, Janet Wagner, admitted that prior to the fatal collision she had been drinking alcoholic beverages. All of the Defendant police officers had substantial experience in the administration of field sobriety tests, yet took no action to personally determine Janet Wagner's sobriety or level of intoxication.

21. Pursuant to the Las Vegas Metropolitan Police Department policy of investigating traffic accidents and criminal incidents involving fellow police officers and their immediate family members, and despite the patent conflict of interest, Defendant METRO police officers, who were clothed with decision-making authority with

respect to the investigation, proceeded to cover-up the truth of Erin DeLew's death.

22. Beginning immediately upon their arrival at the scene of the fatal traffic collision, and prior to Erin DeLew's death, and continuing until the present time, Defendants deliberately and willfully sought to cover up The facts surrounding the death of Plaintiffs' daughter and wife, respectively, in order to protect the wife of their fellow police officer. Defendant Officer Wagner, from criminal and civil prosecution for causing the death of Erin DeLew in violation of Plaintiffs' constitutional rights. By so doing, Defendants intentionally interfered with the Plaintiffs' right of meaningful access to courts, protected by the U.S. Constitution, as more fully described below. These acts and omissions, which were undertaken in reckless disregard and callous indifference to Plaintiffs' rights, include the following:

a. Deliberately refraining from performing a field sobriety test upon Officer David Wagner's wife, Janet Wagner, despite the fact that (1) Janet Wagner smelled of alcohol; (2) Janet Wagner admitted to drinking alcohol just prior to the fatal collision; and (3) Janet Wagner had been speeding, had made an erratic lane change, and had violated Erin DeLew's right-of-way causing the death of Erin DeLew;

b. Deliberately refraining from performing a chemical blood alcohol test within two hours of the fatal traffic collision;

c. Failing to accurately record statements of all percipient witnesses, and fabricating other portions of these witness statements;

d. Failing to preserve and record physical evidence at the scene of the accident including skid marks, relevant debris and Janet Wagner's level of intoxication;

e. Allowing Defendant Janet Wagner to leave the scene of the fatal collision during the investigation;

f. Making misrepresentations to Plaintiffs, both oral and via the traffic collision report, regarding the facts surrounding their daughter's and wife's death;

g. Making misrepresentations to the Coroner's Office investigator regarding the facts of the fatality and concealing material information from the Coroner's Office;

h. Issuing a false and fraudulent report claiming Plaintiffs' daughter and wife, respectively, was responsible for her own death by making an unsafe lane change with little or no basis for so concluding, and causing the same to be published in newspapers; and

i. Covering up the fraudulent investigation conducted concerning Erin DeLew's death and thereby implicating themselves in the continuing conspiracy to violate Plaintiffs' constitutional rights; and

j. Failing and refusing to take two blood draws separated by time when the blood draw was finally taken.

23. As a result of Defendants actions and inaction described above and below, Plaintiffs have been injured and caused to suffer as follow:

a. Emotional distress, grief, aggravated grief and related damages;

b. Loss of consortium and companionship;

c. Economic losses;

FIRST CAUSE OF ACTION
(Violation of 42 U.S.C. 1983)

24. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 23 above as fully set forth herein.

25. This cause of action is to redress the deprivation under the color of statute, ordinance, regulation, policy, custom, practice or usage of a right, privilege, and unity secured to Plaintiffs by the First, Fifth and Fourteenth Amendments to the Constitution of the United States (42 USC § 1983).

26. Plaintiffs are members of a class of pe sons involved in traffic incidents or criminal incidents with members or family members of the Las Vegas Metropolitan Police Department or the Nevada Highway Patrol.

27. Defendant police officers, while clothed with authority as police officers and acting under color of state law, covered up the true facts of Erin DeLew's death in order to protect Janet Wagner from criminal and civil liability for Erin's death. Defendants, through their actions, inaction, and acquiescence, used their power and position to violate Plaintiffs' constitutional rights by covering up the fact that Janet Wagner caused the death of Erin DeLew.

28. The facts alleged above are part of the customs, practices, policies and decisions of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol including, but not limited to, the following:

a. Inadequately and/or fraudulently investigating allegations of criminal and civil misconduct involving fellow law enforcement officers and their immediate family members, in order to cover-up and protect fellow police officers and their relatives from disciplinary, criminal and civil actions;

b. Covering up the criminal and/or wrongful activities of fellow law enforcement officers and their immediate family members by false reporting, false investigating, perjury and dishonesty;

c. Refusing to supervise, reprimand and/or discipline law enforcement officers who engage in misconduct, whether on or off duty;

d. Investigating traffic and criminal incidents involving fellow law enforcement officers and their immediate family members;

e. Failing to administer adequate and standard field sobriety tests to fellow law enforcement officers or their immediate family members suspected of driving under the influence; in effect, giving preferential treatment to fellow police officers and their immediate family members;

f. Failing to enforce the law, rules, regulations and procedures when an investigation is conducted of a fellow law enforcement officer's misconduct, or a relative of a fellow police officer, and therefore, denying Plaintiffs

and similarly situated citizens equal protection of the laws and meaningful and unimpaired access to the courts as provided in the U.S. Constitution;

g. Inadequately training and supervising police. officers with respect to the investigation of misconduct by fellow law enforcement officers or their immediate family members;

h. Choosing a policy of not implementing procedures and policies that would prevent law enforcement officers from impartially investigating misconduct, including criminal, traffic and other wrongful incidents, involving fellow officers and/or their immediate family members; and

i. Tacitly approving of police officers using their power and position to protect fellow law enforcement officers and their relatives through preferential treatment resulting in interference with other citizens' rights, including the right to meaningful access to courts, as described more fully below.

j. Defendants chose to consciously implement the above customs and policies from various available alternatives.

29. Each of the individual Defendants and METRO and the NHP separately and in concert, acted willfully, knowingly, with reckless disregard and deliberate indifference, and purposefully with the intent to deprive Plaintiffs of their rights and privileges, and did in fact violate:

a. Plaintiffs' substantive right to meaningful and unimpaired access to courts as protected by Article 4 of the Constitution and the Fourteenth Amendment;

b. Plaintiffs' right to petition the government for redress of grievances without interference as protected by the First Amendment right to petition;

c. Plaintiffs' right to present to the judiciary allegations concerning violations of fundamental constitutional rights without impairment or interference as protected by the Due Process Clause of the Fifth and Fourteenth Amendment;

d. Plaintiffs' constitutionally protected right to prosecute without impairment or interference a wrongful death suit for the death of their daughter and wife, respectively, in Nevada State Court;

e. Plaintiffs' right to substantive due process of law, including the right to be free of arbitrary and abusive assertion of governmental power, to be treated with fundamental fairness by governmental authorities, and to maintain their personal integrity and dignity as parents and citizens;

f. Procedural due process of law, including the right to have had a fair and partial investigation of the death of their daughter and wife, respectively, and to have had notice and an opportunity to be heard before METRO and the NHP impaired their property interest to seek total and full redress for Erin DeLew's wrongful death; and

g. Equal protection of the law, including the right to have had a fair and impartial investigation of the death of

their daughter and wife, respectively, and to have the laws equally applied to them.

h. All of the above rights and privileges are secured to Plaintiffs by the provisions of the First Amendment and the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, and by Title 42, United States Code Section 1983.

30. The above acts or omissions of Defendant police officers, both formal and informal, were undertaken while under color of state law and resulted in the violation of Plaintiffs' constitutional rights. Likewise, the customs, practices, policies and decisions of METRO and the NHP alleged herein and as applied to Plaintiffs, resulted in violation of Plaintiffs' constitutional rights as stated herein.

31. Despite the fact that they knew or should have known of the fact that these acts, omissions, decisions, practices, customs and policies, both formal and informal, were being carried out by their agents and employees, METRO and the NHP have taken no steps or efforts to order a halt to this course of conduct, to make redress to these Plaintiffs or other citizens injured thereby, or to take any disciplinary action whatsoever against any of their fellow law enforcement officers. In effect, Defendants METRO and the NHP have ratified the wrongful conduct and custom resulting in violation of Plaintiffs' civil rights.

32. As a direct and proximate result of the aforesaid acts, omissions, customs, practices, policies and decisions of the individual police officer Defendants, METRO and the NHP, and each of them, Plaintiffs suffered great mental anguish, fright, nervousness, anxiety, grief, shock,

humiliation, loss of consortium, indignity, embarrassment, apprehension all to their damage in a sum to be determined at trial. Plaintiffs have been greatly humiliated a result of the foregoing acts of the Defendants. Plaintiffs have been forced to incur substantial obligation for attorney's fees, court reporter's fees, investigation expenses, and other expenses in the vindication of their constitutional rights.

33. Defendants' actions were attended by circumstances of malice, insult and a reckless disregard for the rights and feelings of Plaintiffs.

SECOND CAUSE OF ACTION
(Conspiracy to Violate 42 U.S.C. 1983)

34. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 33 above as fully set forth herein.

35. This cause of action is to redress the deprivation under the color of statute, ordinance, regulation, policy, custom, practice or usage of a right, privilege and immunity secured to Plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States by virtue of a conspiracy between Defendants Janet Wagner, David Wagner, the Las Vegas Metropolitan Police Department, State of Nevada, ex rel., the Nevada Highway Patrol, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer Greg Goen, Sergeant William Adamson, Sergeant Harvey Weatherford, Trooper Joseph A. Smith, Trooper Garth

Gardner, Trooper Joseph Wyngard and Trooper James Brannum, Does I through XX inclusive, and Roe Corporations XX through XXX, to cover up the true facts of Erin DeLew's death to protect Janet Wagner from criminal and civil liability for Erin's death.

36. During all times mentioned herein, the individual named law enforcement officers and each of them, separately and in concert, acted under color and pretense of law, under color of the statutes, ordinances, regulations, policies, practices, customs and usage's of the State of Nevada, the County of Clark and City of Las Vegas. Each of the individual Defendants here, separately and in concert, engaged in the illegal conduct here mentioned to the injury of Plaintiffs and deprived Plaintiffs of the rights, privileges, and immunities secured to Plaintiffs by the First, Fifth and Fourteenth Amendments to the Constitution of the United States and the laws of the United States, as identified above.

37. On and after September 27, 1994, at said time and place, and thereafter, while investigating the incident described herein, Defendants, members of METRO and NHP, including Defendant law enforcement officers, and DOES I-XX and XX-XXX, and each of them, while acting under the color of state law, consciously, willfully, maliciously and intentionally conspired to protect fellow Officer's David Wagner's wife, Defendant Janet Wagner, from, civil and criminal liability by covering up the true facts of Erin DeLew's death These acts, as more fully described above, include refraining from administering a field sobriety test to Officer's David Wagner's wife or a blood alcohol test within two hours of the collision, or two blood draws separated by time, intentionally and

willfully refraining from collecting and recording other evidence at or near the scene of the accident, including witness statements, skid marks, point and area of impact, and Janet Wagner's level of intoxication.

38. Defendants overtly acted in furtherance of this conspiracy by undertaking the acts described above.

39. Defendant METRO police officers and Defendant NHP officers were clothed with the power and authority of Clark County, the City of Las Vegas, and the State of Nevada, respectively, to make decisions on behalf of these public entities. By virtue of this delegated power and authority, these Defendants furthered the conspiracy in such fashion that the conspiracy became an informal decision, practice or policy of Clark County, the City of Las Vegas, and State of Nevada.

40. Defendants consciously, intentionally, willfully. and deliberately conspired and continued to conspire and agree among themselves to damage Plaintiffs by consciously, intentionally, willfully, and deliberately destroying, altering, fabricating and/or failing to note and/or record evidence, in furtherance of the conspiracy to violate Plaintiffs' civil rights. Moreover, Defendants' conspiracy was executed pursuant to the customs and policies identified above resulting in violations of Plaintiffs' constitutional rights. Defendants chose to consciously implement these customs and policies from various available alternatives.

41. The above acts or ommissions of Defendant police officers, both formal and informal, were undertaken while under color of State law and resulted in the violation of Plaintiffs' constitutional rights. Likewise, the

customs, practices, policies and decisions of METRO and NHP alleged herein and as applied to Plaintiffs, resulted in violation of Plaintiffs' Constitutional rights as identified above.

42. The above acts, omissions, customs, practices and/or decisions of METRO and the NHP, while carried out under color of state law, have no justification or excuse in law, and instead constitute a gross abuse of governmental authority and power, shock the conscience, are fundamentally unfair, arbitrary and oppressive, and unrelated to any activity in which police officers may appropriately and legally engage in the course of protecting persons or property, or ensuring civil order. The above acts, omissions, decisions, customs, practices, or policies were consciously chosen from among various alternatives.

43. As a direct and proximate result of the conspiracy to violate their constitutional rights, Plaintiffs have suffered great mental anguish, fright, nervousness, anxiety, grief, shock, humiliation, indignity, embarrassment, apprehension all to their damage in a sum to be determined at trial. Plaintiffs have also been forced to incur substantial obligations for attorney's fees, court reporter's fees, investigation expenses, and other expenses in vindication of their constitutional rights.

44. Defendants' actions were attended by circumstances of malice, insult and a reckless disregard for the rights and feelings of Plaintiffs.

WHEREFORE, Plaintiffs pray for judgment in favor of Plaintiffs, and against Defendants, as follows:

FIRST CAUSE OF ACTION

1. For special damages in an amount in excess of $10,000.00;

2. For general damages for each Plaintiff in an amount in excess of $10,000.00;

3. For exemplary damages, in an amount to be determined by the trier of fact.

4. For attorney's fees and costs; and

5. For such other and further relief as this Court deems just and proper.

SECOND CAUSE OF ACTION

1. For special damages in an amount in excess of $10,000.00;

2. For general damages for each Plaintiff in an amount in excess of $10,000.00;

3. For exemplary damages in an amount to be determined by the trier of fact.

4. For attorney's fees and costs; and

5. For such other and further relief as this Court deems just and proper.

DATED this 26th day of September, 1996.

Respectfully Submitted,

FOLEY & JONES

A PROFESSIONAL CORPORATION

/s/ Daniel T. Foley

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL C. DELEW, individually and MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY, Plaintiffs, vs. JANET KATHLEEN WAGNER, and DOES I through V inclusive, and ROE CORPORATIONS V through X, Defendants.	Case No. A364616 Dept. No. II Docket No. D

MOTION TO DISMISS

(Filed Jan. 24, 1997)

Date of Hearing: 2/20/97

Time of Hearing: 9 AM

COMES NOW, the Defendant, JANET KATHLEEN WAGNER, by and through her attorneys and moves this

Honorable Court pursuant to the provisions of NRCP 12(b) and 56(b) for an order dismissing the Plaintiffs' Complaint on file herein.

This motion is made on the grounds that the Plaintiffs cannot state a valid cause of action and on the further grounds that there is no undisputed issues of fact relevant to a final judgment in this action.

This motion is made and based on all files, pleadings and records on file herein together with the points and authorities attached hereto.

EDWARDS & HALE, Ltd.

By /s/ Keith Edwards, Esq.
KEITH EDWARDS, ESQ.
Nevada Bar #002299
Attorneys for Defendant,
Janet Kathleen Wagner
415 South Sixth Street, #300
Las Vegas, Nevada 89101

NOTICE OF MOTION

TO: Plaintiffs above-named; and

TO: DANIEL T. FOLEY, ESQ., their attorney;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Dismiss on for hearing before the above-entitled Court on the 20 day of February, 1997, at the hour of 9:00 o'clock in the forenoon said date in Department No. II.

DATED this 23rd day of January, 1997.

EDWARDS & HALE, Ltd.

By /s/ Keith Edwards
KEITH EDWARDS, ESQ.
Nevada Bar #002299
Attorneys for Defendant,
Janet Kathleen Wagner
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Las Vegas, Nevada 89101

POINTS AND AUTHORITIES

On or about September 27, 1997 Janet Rae Delew was riding her bicycle across Lake Mead Boulevard and rode into the path of the vehicle operated by the Defendant JANET WAGNER, where she was struck and killed. On November 10, 1994 a civil action was filed in the District Court for Clark County, Nevada by the heirs of Janet Rae Delew against Defendant JANET WAGNER alleging negligence and intoxication on the part of the defendant. That matter proceeded in normal course and extensive discovery followed including the depositions of over twenty potential trial witnesses or investigators of the accident. The depositions that were taken include the depositions of all but one of the defendants now named in this action. After taking the depositions of all of the officers at the scene of the accident and on the eve of the statute of limitations the plaintiffs filed a motion to amend their complaint to join the investigating officers as parties. The motion was denied and this new and separate action followed.

Clearly erroneous allegations

Apparently in an attempt to state a cause of action under 42 USC § 1983 the plaintiff has alleged:

> 19. Immediately upon their arrival at the scene of the collision, and prior to Erin Delew's death, defendant METRO and NHP officers realized that Defendant Officer David Wagner's wife, Defendant Janet Wagner, had been drinking alcoholic beverages, had been driving her vehicle at speeds in excess of 30% of the posted speed limit, and had violated the right-of-way of Erin DeLew causing Erin DeLew's [sic] death. Defendant police officers realized that Plaintiffs' daughter and wife, respectively, was fatally injured.

There appears to be an inconsistency in the allegations which state that the officers arrived at the scene "prior to Erin Delew's death" and then allege in the same paragraph that the "defendant police officers realized that [Erin Delew] was fatally injured." The issue of the time of Mrs. Delew's death has some bearing on a § 1983 action and is resolved very quickly by the testimony of the first witness at the scene of the accident.

Robert A. McNeese was a Lieutenant Colonel in the Air Force assigned to Nellis Air Force Base. At the time of the accident he was walking his dog when he heard a noise, knew an accident had occurred and ran to the scene. He stated that he was the first person at the scene. Deposition transcript pp. 12-13. After arriving at the scene he went directly to the victim. He testified as follows:

Q. With respect to the victim, were you able to render any assistance?

A. I felt for pulse. Couldn't find a pulse. I listened for breathing. Couldn't hear a heartbeat. Couldn't hear any breath, you know, with my ear up to her back as she was laying face down. There was a lot of blood loss, a massive head wound. And I checked her pupils and although I'm not a medical person, I have seen fatalities before, and I determined in my mind that she was a fatality. When I got to her, her eyes were – her pupils were fixed and dilated, and that usually a pretty good sign of no brain activity.

Q. Did you have any conversations with anybody at the scene?

A. Yes. I had a conversation with my wife because she came over when I told her that I couldn't find a pulse and she felt for a pulse both on the writs and on the victim's neck, and my wife thought she felt a very, very faint pulse, and it may have just been some residual. I don't think it wasn't a strong strong pulse. We had that conversation. And then another woman who I believe was the woman on the bicycle came into the street and she was suggesting that we try to give the victim CPR and I disagreed with her. I said I didn't think it would do any good because I thought the person was already dead and besides the fact that there's a bad trauma to the head and she's laying on her stomach and you'd have to roll her over to do CPR and that could create more problems with a head or neck injury, and we should probably just wait and before the police arrive and before

> the ambulance arrived two gentlemen were jogging by, running by. Both of them ran over and asked what's going on?" and one of them said, "I'm a doctor." And he bent down over the – called her the body and said, "I think she's dead." And he did the same thing, lifted up her eyelid and looked at her eyes and he said, "Yes, I think she's dead. There's nothing that can be done for her here." And I said, "The ambulance is on the way and the police are on the way." And he said, "fine," and continued to run up the street. Deposition pp. 18-20 (See Exhibit "A").

The witness went on to explain that a single patrolman arrived at the scene checked the victim and indicated that nothing could be done for her. An emergency vehicle then arrived, hooked up a small portable EKG and got a flat line and "they said she was deceased at that point." (Deposition p. 22).

There is no 42 USC § 1983 cause of action

The foregoing is of significance because of the claim that Mrs. Delew's civil rights were violated. However, the First Cause of Action of the Complaint is not directed at Mrs. Wagner. The plaintiffs appear to have recognized that by its terms, § 1983 applies only to individuals acting "under color" of law. In other words, a defendant cannot be held liable under 1983 unless his actions can be "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). Perhaps that is why Janet Wagner is only referred to peripherally in the First Cause of Action.

The Ninth Circuit Court of Appeals has ruled that the civil rights of a person cannot be violated after the death of that person. *Estate of Cartwright v. City of Concord*, 618 F. Supp. 722 (ND CA.1985), aff'd 856 F.2d 1437 (9th Cir. 1988).

> Defendants argue that no post-death events could legally interfere with plaintiffs' alleged constitutional rights, under the authority of Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979); Whitehurst v. Wright, 592 F.2d 834, 840-841 (5th Cir. 1979); McQurter v. City of Atlanta, 572 F. Supp. 1401, 1419 (N.D. Ga. 1983). Those authorities are persuasive that the civil rights of a person cannot be violated after death, and therefore the scope of an investigation after death is not actionable.
>
> Plaintiffs' response is that the lack of thoroughness of the investigation was a policy of defendants, which policy existed prior to Cartwrights' death, and that the policy resulted in procedures which insulated the city and its personnel from liability for violations of constitutional rights. See Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982), aff'd in part on rehearing, 739 F.2d 99 illegible Cir. 1984). See also Gomez v. Whitney, 757 F.2d 1005 (9th Cir. 1985).

The court rejected the claim that the defendants' inadequate investigation and failure to preserve evidence deprived her of a constitutional right. *Id.* at 730. In affirming the lower court decision the Ninth Circuit Court of Appeals specifically also rejected the claim that there had been a deprivation of a constitutional right. See 856 F.2d at 1438.

The Ninth Circuit has also ruled that there is no constitutional right "to have a full and fair police investigation into violence done against themselves or their children." In the case of *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1984), the plaintiffs brought an action when their son died as a result of an apparent accident while trespassing on a construction site with two other juveniles. The police conducted a cursory investigation and decided not to recommend that any charges be brought against the decedent's companions. When Mr. Gomez, Sr. was unable to convince the police department to re-open the investigation he filed an action claiming that his family's civil rights had been violated by the police department's inadequate investigation. In affirming the district court's dismissal of the case the appellate court said:

> A prerequisite to recovery under the Civil Rights Act, *42 U.S.C. § 1983*, is that the plaintiff prove that the defendants deprived him of a right secured by the Constitution and the laws of the United States. *Martinez v. California*, 444 U.S. 277, 284, 62 L.Ed. 2d 481, 100 S. Ct. 553 (1980). A threshold question in this appeal, then is whether or not the appellants' claim involves the deprivation of a protected right.
>
> The appellants claim that the right infringed was a due process right to have a full and fair police investigation into violence done against themselves or their children. However, we can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved. See, e.g., *Smith v. Ross*, 482 F.2d 33 (6th

Cir. 1973) (police failure to protect against housing discrimination).

> Because the appellants have failed to state facts that constitute the infringement of a protected right, their § 1983 claim must necessarily fail, and the district court was consequently correct in granting summary judgment against them. The judgment of the district court is therefore AFFIRMED.

The Plaintiffs' attempt to link the wrongful death action of Erin Delew to the subsequent police investigation is merely a veiled attempt to insert into this action facts which occurred after the accident which had nothing to do with the death of the bicyclist. The true nature of this action is best reflected by the eye witness who simply states that the bicyclist rode her bike across the path of an oncoming vehicle without looking (see Exhibit "B"). No matter what the police did or did not do after the accident will not change the actions of the bicyclist. However, if the Plaintiffs can insert enough extraneous and collateral facts into the case to make it appear that something in the investigation was done wrong, there might be enough to obscure the actions of the bicyclist and change the focus of the trial to one of investigative misconduct. The investigation has nothing to do with the wrongful death of the bicyclist.

There is no "Conspiracy to Violate 42 U.S.C. 1983" cause of action

Again for a conspiracy cause of action to have any substance the victim had to be alive when (as plaintiffs allege) "[d]efendant police officers realized that . . . [Erin

Delew] was fatally injured." (Complaint ¶ 19) If as alleged, the officers realized she was fatally injured, there was already a fatality and there is no violation of civil rights.

However, the allegations set forth in ¶¶ 34 through 44 fail to set forth any conduct of Defendant JANET WAGNER which indicated her knowledge or participation in any conspiracy. In fact that conspiracy claim seems to omit Mrs. Wagner when the Plaintiffs allege in ¶ 40:

> Moreover, Defendants' conspiracy was executed pursuant to the customs and policies identified above resulting in violations of Plaintiffs' constitutional rights. Defendants chose to consciously implement these customs and policies from various available alternatives.

Obviously Mrs. Wagner had no customs or policies which violated the plaintiffs constitutional rights; nor is she accused of participating [sic] the implementation of those customs and policies. In short the plaintiffs seem to aim their conspiracy action at the investigative agencies rather than at Mrs. Wagner.

In a somewhat analogous case of *Scott v. Dally*, No. 92-5006-CV-SW-1 (W.D. MO. 1992) the court observed that:

> Plaintiff has not alleged a conspiracy of any sort between the prosecutor and the individual defendants in this action. Indeed, the plaintiff alleges that defendant Gil Stevens, as a representative of defendant Brady Stevens Company, committed "perjury" when he presented his information to defendant Dally for prosecution.

> Rather than alleging any conspiracy or agreement between the defendants, plaintiff has alleged that one defendant (defendant Stevens) gave false information to another defendant (defendant Dally). Moreover, in her complaint, plaintiff makes absolutely no allegations whatsoever regarding defendant McMillan.

Similar to the *Scott* case the Plaintiffs have not alleged any overt action on the part of Mrs. Wagner. A conspiracy requires a willful participation by the participants in order to meet the requirements of 42 U.S.C. 1983. *Shipley v. First Fed. S & L Ass'n of Delaware*, 703 F. Supp. 1122 (D. Del. 1988).

Plaintiffs are attempting to split their cause of action

The Plaintiffs in this case filed a wrongful death action over two years ago against Janet Wagner. Now, after extensive discovery in that case, they seek to augment that action with this new and separate cause of action. It has long been established that a party may not split his cause of action. Louisiana courts hold that a plaintiff cannot split his claims for personal injuries and property damage arising from the same accident. *Fortenberry v. Clay*, La.App.1953, 68 So.2d 133; *Thompson v. Kivett & Reel, Inc.*, La.App.1946, 25 So.2d 124. In addition, in wrongful death cases courts forbid the survivor to split his damages and the decedent's damages. See *Reed v. Warren*, 1931, 172 La. 1082, 136 So. 59; *Norton v. Crescent City Ice Mfg. Co.*, 1933, 178 La. 135, 150 So. 855.

The issue was discussed in some depth in the case of *King Gen Contrs., Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 1991 Mo. App. LEXIS 444, (Court of

Appeals of Missouri, Western District, 1991). In that action the court observed:

> A cause of action which is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the merits in the first suit is a bar to a second suit. In general, the test for determining whether a cause of action is single and cannot be split is: 1) whether separate actions brought arise [*6] out of the same act, contract or transaction; 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions: The word "transactions" has a broad meaning. It has been defined as the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose. [Citations omitted].
>
> The cases dealing with res judicata and the splitting of a single cause of action apply the same standard as the compulsory counterclaim rule. In State ex rel. J.E. Dunn, Jr. & Associates, Inc. v. Schoenlaub, 668 S.W.2d 72, 75 (Mo. banc 1984), our Supreme Court said, in holding barred a claim which logically should have been presented as a counter claim in an earlier lawsuit:
>
> The clear function of the [complusory counterclaim] rule is to serve as "a means of bringing all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims."

As discussed above, the Plaintiffs' decision to willfully hold off on their 1983 action was fraught with error. They have attempted to prejudice Janet Wagner, but have acted

at their own peril. Their actions are improper and fail to follow the rules established by the courts.

Conclusion

As set forth above the Plaintiffs have misconstrued the facts, intermixed causes of action and failed to set forth facts necessary to support a 42 U.S.C. 1983 action against Mrs. Wagner. The cause of action represents an attempt on the part of the Plaintiffs to split their actions and use one for discovery and hold off on the other until they had obtained the depositional statements of the new defendants in order to prove up their new cause of action. The Plaintiffs seek to do by indirection that which cannot be done directly. Their action against Mrs. Wagner must fail.

Respectfully submitted,

EDWARDS & HALE, Ltd.

By /s/ Keith Edwards
KEITH EDWARDS, ESQ.
Nevada Bar #002299
Attorneys for Defendant,
Janet Kathleen Wagner
415 South Sixth Street, #300
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that I am an employee of EDWARDS & HALE, Ltd., and that on the 24th day of January, 1997, I deposited for mailing at Las Vegas, Nevada, a true and

accurate copy of the above and foregoing Motion to Dismiss addressed as follows:

DANIEL T. FOLEY, ESQ.
FOLEY & JONES
302 E. Carson Avenue, Suite 901
Las Vegas, Nevada 89101

/s/ Barbara E. Shank
BARBARA E. SHANK,
an employee of
EDWARDS & HALE, Ltd.

EXHIBIT A

[p. 18] involved in the accident, or at least it looked to me as if there had been drinking involved in the accident.

Q. Did you smell any alcohol on her breath?

A. No.

Q. Was her thought process logical?

MR. RASTELLO: No foundation, objection.

THE WITNESS: I couldn't say it was logical – whether it was logical or not.

Again she was, you know, just from my observation, I think she was in shock. She was in shock and didn't, you know, just didn't want to believe what had happened or, you know, was trying to comprehend what had happened, but she – I wasn't surprised at her conduct that,

you know, considering what just had happened. She acted like a lot of people would in the same situation.

BY MR. EDWARDS:

Q. With respect to the victim, were you able to render any assistance?

A. I felt for pulse. Couldn't find a pulse. I listened for breathing. Couldn't hear a heartbeat. Couldn't hear any breath, you know, with [p. 19] my ear up to her back as she was laying face down.

There was a lot of blood loss, a massive head wound. And I checked her pupils. And although I'm not a medical person, I have seen fatalities before, and I determined in my mind that she was a fatality. When I got to her, her eyes were – her pupils were fixed and dilated, and that's usually a pretty good sign of no brain activity.

Q. Did you have any conversations with anybody at the scene?

A. Yes.

I had a conversation with my wife because she came over when I told her that I couldn't find a pulse and she felt for a pulse both on the wrist and on the victim's neck, and my wife thought she felt a very, very faint pulse, and it may have just been some residual. I don't think – it wasn't a strong pulse.

We had that conversation. And then another woman who I believe was the woman on the bicycle came into the street and she was suggesting that we try to give the victim CPR and I disagreed with her. I said I didn't think it would do any good because I thought the person was

already [p. 20] dead and besides the fact that there's a bad trauma to the head and she's laying on her stomach and you'd have to roll her over to do CPR and that could create more problems with a head or a neck injury, and we should probably just wait.

And before the police arrived and before the ambulance arrived, two gentlemen were jogging by, running by. Both of them ran over and asked, "What's going on?" And one of them said, "I'm a doctor." And he bent down over the – called her the body and I said, "I think she's dead."

And he did the same thing; lifted up her eyelid and looked at her eyes and he said. "Yes, I think she's dead. There's nothing that can be done for her here." And I said, "The ambulance is on the way and the police are on the way." And he said, "Fine," and continued to run up the street.

Q. How do you know an ambulance and the police were on the way?

A. Well, I was assuming that because Mrs. Wagner had a cellular phone and I believe either she used it or someone else did. But a guy had driven up shortly after the accident in another car and he did have a cellular phone and he, I know, either [p. 21] called 911 or was using the cellular phone to call for help.

Q. Did you have any other conversations with anyone at the scene?

A. Various conversations with the ambulance people when they first got there, the first policeman on the scene, and I'm not real sure. I thought it was a motorcycle

patrolman because I thought he had a helmet on, but I'm not a hundred percent sure, but I know the policeman first got there. I was still with the victim and he came up and I told him what I thought, and he looked at the victim and felt for a pulse also and didn't think that there was anything that we could do for her at that point.

Q. Do you know if the police or the ambulance arrived first?

A. I believe the police arrived first. I think a single patrolman arrived – it seemed like a long time – 10 or 15 minutes after I had been there. And then a while after that before the ambulance showed up, another five to ten minutes, at least. It seemed like an eternity before a policeman showed up. I couldn't believe it was taking so long or [sic] an ambulance, anything.

[p. 22] Q. Do you know where the policeman had to come from?

A. No.

Q. Do you know where the closest – did paramedics come?

A. It was a normal orange and white square, you know, ambulance truck type ambulance with two technicians that came. They –

Q. Do you know if they were paramedics?

A. They acted like paramedics. They weren't like firemen type paramedics that you see when the fire department comes, but they had the same demeanor about them and pulled some equipment out of the ambulance. Did the same thing, checked for pulse, checked for

breath, and then they put a – looked like an EKG, small portable EKG machine out on the street. Hooked up the wires to the victim in the street to try to find, I believe, a heartbeat. You know, it was just a flat line, and they said she was deceased at that point.

Q. Do you know if – was there ever a blue and white ambulance that came to the scene?

A. I don't remember a blue and white ambulance. In my mind I see an orange and white ambulance but maybe that's because I see those all

* * *

EXHIBIT B

Page 1 of 2 VOLUNTARY STATEMENT 940927-1625

THIS PORTION TO BE COMPLETED BY OFFICER.

Specific Crime
Fatal Accident

Date Occurred
9-27-94

Time Occurred
1916

Location of Occurrence
W. Lake Mead East & Ridgemoor [X] City
[ ] County

Can You Identify the Suspect? [ ] Yes
[X] No

Name (Last/First/Middle)
Olsen Susie S.

Date of Birth
6-28-52

Social Security #
562-84-3019

Race	Sex	Height	Weight	Hair	Eyes
C	F	5'3"	145	Bl	Blu

Work Schdl. (Hours): varies

(Days Off): 1

Business/School
Clark County S

Residence Address: (Number & Street)
2313 Huntsville

Bldg./Apt.#	City	State	Zip Code
	Las Vegas	NV	89134

Res. Phone: 363-7142

Bus. Phone:

Bus. (Local) Address: (Number & Street)
varies

Bldg./Apt.# City State Zip Code

Occupation Depart Date (if visitor)

Best place to contact you during the day
Sub services

Best time to contact you during the day
5-6 PM afternoons

DETAILS

As I came up to Lake Mead (turning right from Ridgemoor) I saw the woman on the dark bike

(no strobe or lights) swerving a lot because she was trying to negotiate turning to cross the street going uphill, plus she had a bag of groceries she was carrying. She had trouble getting any speed to cross. She may not have seen the Explorer coming toward her because she had a headset on. The Explorer (driver) certainly could not see her until it was too late because the road was curving – trees blocked vision in mid – on divider – as driver came up going no faster than speed limit – I noted that because before impact I realized the Explorer would collide with bike rider before it happened. I looked in my rear view mirror & saw the Explorer impact & brake & the bicyclist slide off Explorer.

I HAVE READ THIS STATEMENT AND I AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT (LOCATION) Accident Scene

ON THE 27TH DAY OF SEPT AT 9:30 (AM/PM) 1994

Witness Officer: Illegible #1937
(SIGNATURE)

Witness Officer: Illegible #1937
(ILLEGIBLE)

/s/ Susie Olsen
SIGNATURE OF PERSON
GIVING STATEMENT

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. A339613
Dept No. XIII
DOCKET NO. "G"

DEPOSITION OF JANET KATHLEEN WAGNER
November 7, 1995

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Plaintiffs,

vs.

JANET KATHLEEN WAGNER, and DOES I through V inclusive, and ROE CORPORATIONS V through X,

Defendants.

APPEARANCES:

For the Plaintiffs:

FOLEY & JONES
By Daniel T. Foley, Esq.
302 East Carson Avenue
Suite 901
Las Vegas, Nevada 89101
(702) 383-9852

HOLLAND & HART
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(303) 395-8200

For the Defendant Wagner: EDWARDS & HALE
By Keith Edwards, Esq.
415 South Sixth, Suite 300
Las Vegas, Nevada 89101
(702) 382-1414

[p. 114] A From my cellular phone.

Q And where were you standing?

A In the street.

Q Okay. In front of your vehicle?

A I believe so, yes.

Q Between your vehicle and Erin?

A Near both the truck and her. I can't say between the two.

Q How many people appeared at the scene shortly after the collision occurred?

A I don't know exactly. I would say within the first few minutes there were maybe five or six people there.

Q Okay. And this woman that you took the phone from, can you describe her for me?

A No, I don't remember who it was that gave it to me.

Q And did you take the phone right there and dial?

A After she gave the phone to me, I called my husband at home.

Q And you called her from where – from that spot where she –

MR. EDWARDS: Counsel, you've asked this four times. Four times. I can tell you exactly where she was. You're not going to do this at trial, and you don't have a right to do it here.

MR. FOLEY: Sure he does.

* * *

[p. 123] A Within the year previous?

MR. EDWARDS: She – go ahead.

A Maybe once or twice.

Q (BY MR. RASTELLO) Okay. When did you first see your husband arrive at the scene?

A I don't know what time it was. Again, I would guess that it was probably about 15 minutes after the accident occurred.

Q And he drove his Monte Carlo from the house to the scene somewhere, but you don't know where he parked?

A Right. I know that he was parked on the street, and I believe he was parked towards the median. My guess would be that he was on the median in the westbound lane, but I just can't specifically picture it being there.

Q And the westbound lane would have been in the – pointed the same direction as your truck?

A Right.

Q Somewhere behind it?

A Right.

Q Had any police officers arrived at the time you first saw your husband?

MR. EDWARDS: She's already answered that.

A I don't remember.

Q (BY MR. RASTELLO) When you saw your husband, what did you do?

* * *

[p. 125] Q Well, what's your best memory?

A I just remember various people showing up at the accident scene. Again, I know there was an ambulance there and police were there, but I really was not cognizant of the sequence of events or the series of events or what was going on around me.

Q How long did you communicate with your husband during that first physical communication with him?

A I don't even remember if there was a verbal communication at that time.

Q But how long of a time period were you next to one another?

A He was next to me most of the rest of the night.

Q Did he have his arm around you?

A At sometimes maybe. Not the entire night.

Q Okay. At some point in time did paramedics arrive at the scene?

A I again remember seeing an ambulance there. I would assume there were paramedics there. But I couldn't say how many or positively that there was a paramedic there.

Q Did your husband notice that – the odor of alcohol on your breath?

A Not that I'm aware of.

* * *

[p. 129] officer who asked me if I was injured or needed some attention, and that was the extent of the exchange.

Q Can you describe this police officer for me?

A No, I don't recall what he looked like.

Q White, black, yellow, or older?

A I wasn't paying attention.

Q Did this police officer ask you for your driver's license?

A Not that I recall, no. Not at that first initial contact, in other words. I know at one point somebody did ask me for my driver's license. I don't know if it was him or another officer and, again, I don't believe it was at that initial contact.

Q Did any Metropolitan police officer attempt to – to separate you from the scene of the collision or to segregate you from other people at the scene?

A No. Not that I'm aware of.

Q And during your first communication with a uniformed Metropolitan police officer, the only thing you

recall them asking or him asking was whether or not you were okay?

A Yes.

Q What's the very next thing that you remember happening after that?

[p. 130] A Just like I said, you know, several people arriving. Additional police officers and highway patrol troopers. You know, I was not doing anything in particular. It wasn't any specific occurrence that I recall as happening in any sequence.

Q Well, why don't you tell me generally what happened during the next two hours while you were at the scene of the collision?

A I was just sitting near the street.

Q Where?

A You know answering – various places along the curb. I was in and out of a couple of different cars. People would coax me to sit down in a car or something. Again, I was kind of walking just back and forth down the street, you know, in a short area by where the accident occurred. Occasionally somebody would ask me a question. That's about it.

Q During the first two hours at the scene after the collision, did any Metropolitan police officer attempt to take a witness statement from you?

A Yes. There was an officer who asked me generally what had happened, and I gave a statement to him. I don't know what time that was, but I do believe it was within the first hour and a half or so.

[p. 134] Q (BY MR. RASTELLO) Do you know the reason Officer Wagner did not inform any other Metropolitan police officer that you had been drinking?

MR. EDWARDS: Object. Instruct the witness not to answer.

MR. FOLEY: You know, for the record, I think she's waived the privilege at least to a limited extent to this issue given that she has now testified about a communication she had with her husband which was not objected to when she told him that she had been drinking.

MR. EDWARDS: Appreciate your ruling on it.

MR. FOLEY: I didn't rule on it, Keith, or were you just trying to be cute?

Q (BY MR. RASTELLO) After your husband arrived at the scene, is it fair to say that you and he were physically together for the next hour and a half at the scene of the collision?

A We were – you know, at times close together and at times we weren't. Again, I was walking around and up and down and not in one stationary place, and so at times he was next to me and at times he was, you know, maybe several feet or yards away.

Q During the first two hours after the traffic collision, what did you observe the

* * *

[p. 141] A No, I don't.

Q Do you know if your husband called Sergeant Albert that night?

MR. EDWARDS: I'll object. Instruct the witness not to answer.

MR. RASTELLO: That's really – I'm not going to argue with you.

Q (BY MR. RASTELLO) Did your husband call Sergeant Albert that night?

MR. EDWARDS: Object. Instruct the witness not to answer.

MR. RASTELLO: Keith, that has nothing to do with the communication between married people.

MR. FOLEY: It really doesn't. It was something communicated by Albert to Mrs. Wagner.

MR. RASTELLO: It could have been something she observed. Don't be an obstructionist. We're just going to spend a lot of time and money for very little gain by both sides, including your client.

MR. EDWARDS: Why don't you ask her if she knows how Sergeant Albert found out about the accident.

Q (BY MR. RASTELLO) Sure. I'll ask that.

A Do I know how Sergeant Albert found out about the accident?

Q Right.

A I know now that my husband called him and [p. 142] I think it was because he used my cellular phone,

although I'm really not sure. But I have gathered that, that he called him at some point. I think he – my husband may have told me that he called him.

Q Okay. And did Sergeant Albert come to the scene?

A Yes.

Q And did you speak with him?

A At various points in the night, I did talk to him, yes.

Q What did you talk to Sergeant Albert about?

A Nothing in particular. I mean I wasn't talking much about anything. You know, like I said, I'm sure he asked me how I was or, you know, if I wanted something to eat or drink and that was the extent of it.

Q Did Sergeant Albert ask you if you had been drinking?

A No.

Q Did you tell Sergeant Albert that you had been drinking?

A No.

Q Did you see your husband speaking with Sergeant Albert outside of your presence that evening?

A He – he might have. I don't recall.

* * *

[p. 145] were driving, from what I gathered.

Q Any other car, patrol car?

A Yes. I sat in a patrol car.

Q Just one patrol car or more than one?

A Once or twice. I don't recall if it was the same car or not.

Q Okay. Do you know whose patrol car it was?

A No.

Q How is it that you ended up sitting in a patrol car? What led to sitting in that patrol car?

A It was sometime after the accident had occurred, and I asked if I could go home to use the restroom, and they drove me to the house to do that.

Q Okay. Who drove you to the house?

A I don't know who they were.

Q Was your husband with you?

A Yes.

Q And where were you sitting?

A In the back seat of the car.

Q And where was your husband sitting?

A In the back seat of the car.

Q And were there two officers in the front?

A Yes.

Q And you don't know which officers they were?

* * *

DISTRICT COURT
CLARK COUNTY, NEVADA

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November 7, 1995

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* * *

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Q Between your vehicle and Erin?

A Near both the truck and her. I can't say between the two.

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Q And the westbound lane would have been in the – pointed the same direction as your truck?

A Right.

Q Somewhere behind it?

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MR. EDWARDS: She's already answered that.

A I don't remember.

Q (BY MR. RASTELLO) When you saw your husband, what did you do?

* * *

[p. 125] happened next.

Q Well, what's your best memory?

A I just remember various people showing up at the accident scene. Again, I know there was an ambulance there and police were there, but I really was not cognizant of the sequence of events or the series of events or what was going on around me.

Q How long did you communicate with your husband during that first physical communication with him?

A I don't even remember if there was a verbal communication at that time.

Q But how long of a time period were you next to one another?

A He was next to me most of the rest of the night.

Q Did he have his arm around you?

A At sometimes maybe. Not the entire night.

Q Okay. At some point in the time did paramedics arrive at the scene?

A I again remember seeing an ambulance there. I would assume there were paramedics there. But I couldn't say how many or positively that there was a paramedic there.

Q Did your husband notice that – the odor of alcohol on your breath?

A Not that I'm aware of

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Q Did this police officer ask you for your driver's license?

A Not that I recall, no. Not at that first initial contact, in other words. I know at one point somebody did ask me for my driver's license. I don't know if it was him or another officer and, again, I don't believe it was at that initial contact.

Q Did any Metropolitan police officer attempt to – to separate you from the scene of the collision or to segregate you from other people at the scene?

A No. Not that I'm aware of.

Q And during your first communication with a uniformed Metropolitan police officer, the only thing you recall them asking or him asking was whether or not you were okay?

A Yes.

Q What's the very next thing that you remember happening after that?

[p. 130] A Just like I said, you know, several people arriving. Additional police officers and highway patrol troopers. You know, I was not doing anything in particular. It wasn't any specific occurrence that I recall as happening in any sequence.

Q Well, why don't you tell me generally what happened during the next two hours while you were at the scene of the collision?

A I was just sitting near the street.

Q Where?

A You know answering – various places along the curb. I was in and out of a couple of different cars. People would coax me to sit down in a car or something. Again, I was kind of walking just back and forth down the street, you know, in a short area by where the accident occurred. Occasionally somebody would ask me a question. That's about it.

Q During the first two hours at the scene after the collision, did any Metropolitan police officer attempt to take a witness statement from you?

A Yes. There was an officer who asked me generally what had happened, and I gave a statement to him. I don't know what time that was, but I do believe it was within the first hour and a half or so

* * *

[p. 145] were driving, from what I gathered.

Q Any other car, patrol car?

A Yes. I sat in a patrol car.

Q Just one patrol car or more than one?

A Once or twice. I don't recall if it was the same car or not.

Q Okay. Do you know whose patrol car it was?

A No.

Q How is it that you ended up sitting in a patrol car? What led to sitting in that patrol car?

A It was sometime after the accident had occurred, and I asked if I could go home to use the restroom, and they drove me to the house to do that.

Q Okay. Who drove you to the house?

A I don't know who they were.

Q Was you husband with you?

A Yes.

Q And where were you sitting?

A In the back seat of the car.

Q And where was your husband sitting?

A In the back seat of the car.

Q And were there two officers in the front?

A Yes.

Q And you don't know which officers they were?

* * *

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY, Plaintiffs, v. JANET KATHLEEN WAGNER, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, STATE OF NEVADA, EX REL., NEVADA HIGHWAY PATROL, LIEUTENANT EDWARD JENSEN, SERGENT [sic] RICHARD WOMACK, SERGEANT CURTIS ALBERT, SERGENT [sic] THOMAS HARMON, DETECTIVE RICHARD HART, DETECTIVE WILLIAM JOHNSON, OFFICER WILLIAM SMITH, OFFICER KEITH BOWERS, OFFICER DAVID WAGNER AND OFFICER GREG GOEN, SERGENT [sic] WILLIAM ADAMSON, SERGEANT HARVEY	Case No.: CV-5-97-00090-PMP(LRL) **DEFENDANT JANET KATHLEEN WAGNER'S REPLY TO PLAINTIFFS' OPPOSITION TO WAGNER'S MOTION TO DISMISS**

WEATHERFORD, TROOPER	)
JOSEPH A. SMITH, TROOPER	)
GARTH GARDNER, TROOPER	)
JOSEPH WYNGARD AND	)
TROOPER JAMES BRANNUM,	)
DOES I through XX inclusive,	)
and ROE CORPORATIONS	)
XX THROUGH XXX,	)
	)
Defendants.	)
	)

COMES NOW, Defendant, JANET KATHLEEN WAGNER, by and through her attorneys, EDWARDS, HALE, STURMAN & ATKIN, Ltd., and submits the following rebuttal in support of her Motion to Dismiss.

I.

INTRODUCTION

There are three issues are [sic] presented by the Plaintiffs Complaint in this action:

(1) can private citizens be joined in a 42 USC §1983 action for conspiracy when there was no "color of law" involved in the wrongful death?

(2) can the plaintiff state a cause of action for 42 USC §1983 after the plaintiff has already suffered her injury/death?

(3) can the plaintiffs split their causes of action and bring a state wrongful death action and file a separate action under 42 USCA § 1983?

II.

ARGUMENT

The 42 USCA § 1983 Action

Federal Court jurisdiction has been asserted in this case pursuant to 42 USC § 1983, 42 U.S.C. @[sic] 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In this case the plaintiffs have sued JANET WAGNER in state court for wrongful death.[1] Now they are attempting to bring a second action against her for violation of the plaintiffs decedent's civil rights by conspiring with the investigating officers and agencies in the investigation of the accident which caused ERIN RAE DELEW's death. Not only have the plaintiffs attempted to split their causes of action against the Defendant Janet Wagner, but they seek jurisdiction under a statute which clearly does not apply to a private citizen. Complaint ¶ 25.

> 42 U.S.C. @[sic] 1983 (1981 & Supp. 1992). By its terms, @[sic] 1983 applies only to individuals

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[1] Delew v. Wagner, case # A339613 was filed November 10, 1994 (45 days after the accident in which Erin Delew died) and is set for trial to commence in Dept. II on November 10, 1997.

acting "under color" of law. In other words, a defendant cannot be held liable under @[sic] 1983 unless his actions can be "fairly attributable to the state." Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). In Drum v. Nasuti, 648 F. Supp. 888, 897 (E.D. Pa. 1986), aff'd mem, 831 F.2d 286 (3d Cir. 1987) (quoted in Shipley v. First Fed. S & L Ass'n of Delaware, 703 F. Supp. 1122, 1127 (D. Del. 1988)), the court stated:

> the requirement of action under color of law is satisfied . . . when a private person willfully participates in joint action with a state official. . . . Thus, [to survive the defendant's motion for summary judgment,] plaintiff must demonstrate a genuine issue of material fact that there existed between the private defendant and the state official an understanding, agreement, or conspiracy to deprive the plaintiff of a federal right. He must show a genuine factual issue of a combination, agreement, or understanding among the defendants. . . . These [sic] must also be a genuine factual issue that the defendants plotted, planned, or conspired together to carry out the chain of events.

Dicola v. Fulmele, civil action No. 93-0263 (E.D. PA. 1994). (Plaintiffs must allege that the defendant's conduct was taken under color of state law *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995), reh'g denied, cert. denied, 134 L. Ed. 2d 648, 116 S. Ct. 1545, 1996.)

The plaintiffs must not only show some conspiracy between the private citizen and the state official, but they must also demonstrate "that the defendants plotted, planned, or conspired together to carry out the chain of

events." Those events must be actions fairly attributable to the state. Finally, the party asserting the constitutional right must have been living at the time that her rights were breached. *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979); *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979) ("the Civil Rights Act, 42 U.S.C. @@[sic] 1983 and 1985, does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occured after his death.").

In this case the decedent rode her bicycle into the path of the vehicle operated by JANET WAGNER. She was struck and the plaintiffs have attempted to create an [sic] question of fact concerning whether or not she was alive during the accident investigation (in an effort to assert that her constitutional rights were violated by the alleged conspiracy surrounding the investigation.[2]) The formal pronouncement of death apparently did not occur until 9:30 p.m. However, the plaintiffs face something of a dilemma (at least in one circuit); because "the Civil Rights Act, 42 U.S.C. 1983 and 1985, does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occured after his death." *Guyton v. Phillips*, 606 F.2d 248

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[2] The plaintiffs argument that Erin Delew's constitutional right to access to the courts was violated by the conspiracy between the investigating officers suggests that at some time she was going to seek redress through the courts and that the conspiracy affected her ability to unimpaired access to the courts. The fact that her death occurred before or contemporaneously with the investigation suggests that such an argument is only of academic interest and has no real application in this case.

(9th Cir. 1979) but "the victims of a cover-up are the decedent's survivors, not the decedent himself" *Gibson v. City of Chicago*, 910 F.2d 1510, 1523 (7th Cir. 1990), the plaintiffs must either acknowledge that Ms. Delew died before the alleged conspiracy or they must withdraw any personal claim of a conspiracy. The Ninth Circuit has not recognized a cause of action for the survivors of a victim to a "cover up" after a decedent's death. Hence the plaintiffs argue that ERIN DELEW was alive during the investigation. The issue can be resolved through limited discovery should it become necessary.

The cases which deal with the right to bring an action for a police conspiracy to cover up a death seem to involve cases in which the police were actually culpable for the death. See generally *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989), cert. denied, 496 U.S. 924, 110 L. Ed. 2d 638, 110 S. Ct. 2617 (1990); *Whitehurst v. Wright*, supra; *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1264 (7th Cir. 1984).

This case calls into question several issues which are somewhat unique and which challenge the very purpose for which § 1983 was enacted. Historically § 1983 was passed to provide a remedy to individuals who were subjected to harassment and deprivation of rights by governmental officers and agencies. *Monroe v. Pape*, 365 U.S. 167 at 187, 81 S. Ct. 473 at 484, 5 L. Ed. 2d 492 (1961)[3].

---

[3] Section 1979 came onto the books as @[sic] 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by @[sic] 5 of the Fourteenth Amendment to enforce the provisions of that

The unique feature of this case is that the plaintiffs are attempting to bring a § 1983 conspiracy case based on

---

Amendment. n3 Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:

> "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, n4 which has since become a part of the Constitution," n5 viz., the Fourteenth Amendment. Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R. S. @[sic] 1979. See ‹=17› Douglas v. Jeannette, 319 U.S. 157, 161-162. So far petitioners are on solid grounds. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. Wolf v. Colorado,

338 U.S. 25; Elkins v. United States, 364 U.S. 206, 213.

. . .

II.

There can be no doubt at least since ‹=20› Ex parte Virginia, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See Home Tel & Tel. Co. United States v. Classic, 313 U.S. 299. We conclude that it did so intend.

an inadequate or deceptive police investigation (intentionally interfering with Plaintiff's right of meaningful access to courts). The plaintiffs do not claim that any other civil right has been violated. It is not alleged that the police were involved in causing the death of ERIN RAE DELEW. It is not alleged that any of the plaintiffs were deprived of rights guaranteed under the first, fourth, fifth, eighth or fourteenth amendments to the constitution. There is no wrongful death action against the governmental agencies – that cause of action has been split off and filed only against the DEFENDANT JANET WAGNER.

Although there is some divergence between the various circuits[4] the case of *Andrews v. Fowler,* 98 F.3d 1069 (8th Cir. 1996) seems to deal with that issue. In that action the plaintiff complained, among other things, that the sexual assault committed against her was not properly investigated. (It was alleged that the rape had been committed by a police officer). In denying relief under § 1983 the court observed:

---

[4] The Fifth Circuit Court of Appeals has a number of cases (see Plaintiffs' brief) in which it attempts to define the constitutional right of "access to the courts." The right was originally recognized in criminal cases in which prisoners were to provided [sic] certain minimal equipment to assist them in gaining access to the courts. It subsequently was recognized as an infringement in a civil case when the police failed to advise a family of the facts surrounding the death of their son. See also *Foster v. City of Lake Jackson,* 28 F.3d 425 (5th Cir. 1994). Since that time there have been numerous actions to expand the "access to the courts" argument to include "meaningful access to the courts."

> While Price's failure to investigate the rape may have violated state law and common sense, it did not rise to the level of a separate constitutional violation of Andrews' rights. She made no showing that the alleged failure to investigate was on account of her gender so the claim does not implicate equal protection. See Gomez v. Whitney, 757 F.2d 1005, 1006 & n.1 (9th Cir. 1985) (stating "we can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved").

It is pointed out in *Crowder v. Sinyard,* 884 F.2d 804 (5th Cir. 1989) that § 1983 actions were primarily designed to deal with overt conduct or action by a governmental agent or agency; see also general discussion *Jenkins v. Meyers* 338 F.Supp. 383 (ND Ill. 1972) which distinguishes between a § 1983 willful acts done under color of state law and the unintentional common law tort resulting from the alleged negligence not cognizable under § 1983. The Fifth Circuit Court of Appeals has taken a broader view of cases involving "investigative coverups." However, even in that circuit the cases which recognize such a right seem to be connected with other governmental misconduct. *Love v. Bolinger,* 927 F. Supp. 1131 (SD Ind. 1996) in which victim of state-occasioned killing, and/or his survivors, asserted rights violated by a state-occasioned cover-up; *Means v. City of Chicago,* 535 F. Supp. 455 (ND Ill. 1982) conspiracy consisting of the false arrest, unjustified shooting, failure to provide medical attention and attempting to cover up the alleged events after the fact; *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983).

This case appears to present some rather unique issues regarding the potential liability of police officers and private citizens arising out of the investigation of a vehicle accident. Plaintiffs have quoted a number of cases from the Fifth Circuit Court of Appeals to suggest that an estate may bring an action under § 1983 on behalf of the deceased. However, the plaintiff has done nothing to distinguish the Ninth Circuit Court of Appeals cases which hold that there is no constitutional right "to have a full and fair police investigation into violence done against themselves or their children." *Gomez v. Whitney,* 757 F.2d 1005 (9th Cir. 1984); see also *Estate of Cartwright v. City of Concord,* 618 F.2d Supp. 722 (ND CA 1985), aff'd 856 F.2d 1437 (9th Cir. 1988).

Janet Wagner's Rights Were Compromised By The Investigation

The suggestion that JANET WAGNER was a co-conspirator of the police investigation is ludicrous. No one can point to any "conversation or action" between Mrs. Wagner and the investigating officers that reflected an agreement between the officers and her. In fact, had there been such an agreement Mrs. Wagner certainly would never have been subjected to either a field sobriety test or a blood test.

The plaintiffs' desire to implicate Mrs. Wagner in the police investigation ignores the undisputed facts in this case. JANET WAGNER had the right to a properly conducted investigation which included freedom from improper chemical testing without probable cause. Mrs. Wagner was not properly subjected to any inquiry until

some "probable cause" existed to suggest that she had been using alcohol. After "probable cause" existed she could then be given a field sobriety test (HGN). Until she had been administered and failed a field sobriety test she should not have been subjected to any chemical testing. Each of the officers at the scene of the accident was asked what contact they had with JANET WAGNER and if they smelled her breath. Officer Adamson indicated that he was advised upon his arrival at the accident scene that an officer had smelled alcohol on Mrs. Wagner's breath. Adamson deposition pp. 73-74, Officer Alpert testified:

> Dave Wagner didn't know anything about her drinking. I had been sitting next to her for two and a half to three hours and never smelled any alcohol on her, and I was sitting shoulder to shoulder with her.
>
> Q. Did you attempt to smell any alcohol on her?
>
> A. To be honest with you, it never – the thought never entered my mind, but when you're sitting that close to somebody if they've been drinking – and I'm a non-drinker – you can normally smell it. And I was as surprised as Dave was. Depo pp. 55-56
>
> Q. Did you subsequently come to learn that she had been drinking?
>
> A. Yes.
>
> Q. How did you learn that?
>
> A. When she was going down for the blood alcohol test and Dave – well, the NHP officer was standing right there, and Dave had asked, did she pass her field sobriety? And he had said,

> yes, she did – or did she fail it? Either way she passed her test – I don't remember the exact words he used – and that they had requested a blood alcohol test from her. And Dave had asked why. And the trooper had said, she had had a beer. And that's when I learned of it. Alpert Deposition p. 67.

Officer Joseph Smith testified that Officer Wyngard thought he smelled alcohol on Mrs. Wagner's breath. Officer Smith then performed a field sobriety test (horizontal gaze nystagmus or HGN) on Mrs. Wagner.

> Q. Okay. Going back to Mrs. Wagner and the HGN test, did you perform an HGN test upon her?
>
> A. Yes, I did.
>
> Q. And what did you observe?
>
> A. Nothing.
>
> Q. You made no observations?
>
> A. Well, her – I mean as far as the six clues or points that you look for, there weren't any. Besides the eyes being bloodshot and watery from crying, I didn't see any nystagmus whatsoever or smell any order of alcohol coming from her. J. Smith Deposition pp. 115-116.

Officer Wyngard testified, "I smelled this light order unknown alcoholic beverage on her, about her person. (Wyngard deposition p. 50). He also testified that he is "pretty good" at detecting the order of alcohol; that he can smell it when no one else can. Id. at 51. Officer P. Smith was the first Metro officer to arrive at the scene and he testified that he was within 18 to 24 inches of Mrs. Wagner when he interviewed her for her account of the

accident and that he did not detect any odor of alcohol. P. Smith Deposition p. 85. The other officers were not involved with Mrs. Wagner and never had occasion to speak with her or get close enough to smell her breath.

Until Officer Wyngard smelled a "light odor of alcohol about her person" there was no "probable cause" for a field sobriety test. Once Mrs. Wagner passed the field sobriety test there was nothing to justify a blood test. Even at that, if a blood test was going to be performed it had to be done pursuant to the statute which requires:

> 484.379. Driving under the influence of intoxicating liquor or controlled substance: Unlawful acts; affirmative defense
>
> 1. It is unlawful for any person who:
>
> (a) Is under the influence of intoxicating liquor;
>
> (b) Has 0.10 percent or more by weight of alcohol in his blood; or
>
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have 0.10 percent or more by weight of alcohol in his blood, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.
>
> 2. It is unlawful for any person who is an habitual user of or under the influence of any controlled substance, or is under the combined influence of intoxicating liquor and a controlled substance, or any person who inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders

> him incapable of safely driving or exercising actual physical control of a vehicle to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.
>
> 3. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood was tested, to cause the alcohol in his blood to equal or exceed 0.10 percent. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

Despite the fact that Mrs. Wagner's use of alcohol was within 15 minutes of the accident and despite the fact that there was no probable cause to subject Mrs. Wagner to a blood alcohol test and despite the fact that the test was taken more than two hours after the accident, and despite the fact that the results of the test showed a blood alcohol level of 0.05% after the most recent intake had finally entered the blood stream[5]. Mrs. Wagner's rights were of

---

[5] At the time of the accident the alcohol which has been drunk with [sic] 15 minutes was not in the blood stream, but after three hours, despite the trauma of having hit a "darting bicyclist" the most recently ingested alcohol had finally entered the blood stream.

secondary consideration to the investigating officers. Although the investigating officers made mistakes during the investigation those mistakes were to the detriment of Mrs. Wagner and cannot form the basis for a conspiracy.

Splitting Actions

The plaintiffs seem to ignore this defendant's objection to having to defend two lawsuits. As was pointed out (without opposition) in the original Motion to Dismiss the criteria for determining if the plaintiffs have attempted to split their causes of action are:

> 1) whether separate actions brought arise out of the same act, contract or transaction; 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions. The word "transaction" has a broad meaning. It has been defined as the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose. [Citations omitted].
>
> The cases dealing with res judicata and the splitting of a single cause of action apply the same standard as the compulsory counterclaim rule.

King Gen Contrs., Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 1991 Mo. App. LEXIS 444, (Court of Appeals of Missouri, Western District, 1991). The action against JANET WAGNER should have been asserted at the time of the initial complaint. The attempt to now bring a new separate cause of action is ill founded and contrary to cited precedent.

III.

CONCLUSION

The plaintiffs have attempted to make a claim against a private citizen under 42 USCA § 1983, but in so doing have ignored the law in this circuit. Additionally, the attempt to make Mrs. Wagner defend two separate lawsuits arising out of the same facts and circumstances is improper. For the foregoing reasons it is respectfully requested that this court grant DEFENDANT JANET WAGNER's Motion to Dismiss.

DATED this 17th day of March, 1997.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17th day of March, 1997, I served DEFENDANT, JANET KATHLEEN WAGNER'S REPLY TO PLAINTIFFS' OPPOSITION TO WAGNER'S MOTION TO DISMISS by depositing a true copy thereof in the U.S. Mails, postpaid and addressed as follows:

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Supreme Court, U.S.
FILED
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No. 98-276

In The

Supreme Court of the United States

October Term, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW, as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY and VICKIE MAYBERRY,

Petitioners,

vs.

JANET KATHLEEN WAGNER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 143 F.3d 1219 and is reprinted in the Appendix to Petitioner's Petition for Writ of Certiorari [hereinafter "Pet.App."] at pp. 1a to 9a. The order of the United States District Court for the District of Nevada, CV-S-97-090-PMP(LRL) dismissing Petitioners' complaint is unreported and is reprinted at Pet.App. 10a to 12a.

JURISDICTION

The Petitioner and Cross-Petitioners have invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petitioners, in their Complaint, assert the First, Fifth and Fourteenth Amendments of the United States Constitution as the basis for the right of meaningful access to the Court. They have claimed a violation of their civil rights pursuant to 42 U.S.C. § 1983. These provisions are found in the Petition for Writ of Certiorari filed by Petitioners and will not be delineated here.

STATEMENT OF THE CASE

A. Procedural History

On November 10, 1994, Janet Wagner was sued in Clark County District Court (State of Nevada) by the DeLews for the wrongful death of Erin DeLew. Erin DeLew died as the result of an automobile/bicycle accident that occurred on September 27, 1994. That action is still viable and scheduled for trial in Clark County District Court in February of 1999.

A subsequent action (the instant action), filed on September 26, 1996, asserted a 42 U.S.C. § 1983 civil rights violation against the investigating officers of the automobile/bicycle accident and a conspiracy claim against Janet Wagner (Respondent Wagner). The case was removed to Federal Court and Janet Wagner moved to be dismissed from the action.

On April 3, 1997, Judge Philip M. Pro granted Respondent Wagner's motion to dismiss the § 1983 complaint. A conspiracy action against a civilian under 42 U.S.C. § 1983 must allege specific facts to show an agreement and must show that an actual deprivation of constitutional rights resulted from the alleged conspiracy. *Woodrum v. Woodward County*, 866 F.2d 1121 at 1126 (9th Cir. 1989). 42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only those in which the Petitioners have alleged that the Respondents agreed to commit an unlawful act. The District Court, *sue sponte* also dismissed the action against the investigating officers.

During the course of discovery in the original State Court action against Janet Wagner the DeLews have been allowed free, complete and total access to the accident investigation and facts surrounding this accident. At no time have they been denied information concerning the details of the accident or the investigation that followed. Each officer involved in the investigation testified at length (most for a full day) in deposition about his involvement, about his training and about the procedures for conducting a fatal accident investigation. Each has testified about his contact with Mrs. Wagner, her husband's non-involvement in the investigation and the details concerning their perception of her and her conduct at the accident scene. Cross-Pet.App. pp. A-1 to A-10.

The Petitioners have not only had full access to the complete laboratory reports concerning Mrs. Wagner's blood/

alcohol, but, over the objections of the Respondent Wagner, they had the remaining blood sample submitted to their own independent laboratory for analysis.

Despite the fact that the trial judge in the wrongful death action has indicated that the Petitioners would be allowed to explore the role of the traffic investigators, the Petitioners realize that all evidence points to the culpability of the bicyclist, Erin DeLew. Unless they can put the police on trial in the same case there is little chance for the Petitioners to prevail in an automobile negligence action.

Even though the original wrongful death action remains viable and is scheduled for jury trial, the DeLews brought this second action claiming that they have been deprived of "meaningful access to the courts." The only method to obtain jurisdiction over Janet Wagner in the § 1983 action is to allege a conspiracy. However, the DeLews' complaint is deficient.

The complaint against Janet Wagner lacked each of the foregoing items and she moved to dismiss that action on the grounds that (1) it was an improper splitting of actions and (2) she was an improper party in a civil rights action.

On appeal to the Ninth Circuit, the Court rejected Janet Wagner's argument that she was an improper party with the observation:

> In support of their conspiracy claim, the DeLews allege that Janet Kathleen Wagner left the accident scene during the investigation and that LVMPD and NHP officers permitted Wagner to do so.[1]

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1. The information concerning Mrs. Wagner's leaving the scene during the accident investigation comes from Mrs. Wagner's deposition wherein she indicated that she accompanied by two officers to her home nearby to use the bathroom. Deposition of Janet Wagner pp. 145-147. Cross-Pet. App. A-11 to A-13.

> Construing these facts in a light most favorable to the DeLews, it is reasonable to infer an understanding between Wagner and the officers to cover-up the true facts of Erin Rae DeLew's death and thereby deprive the DeLews of their right of access to the courts. Pet.App. p. 8a, 9a

In a precedent setting decision the Ninth Circuit (for the first time) ignored the requirement (1) that there must be a violation of an underlying civil right, and ignored the requirement (2) that there must be an allegation that the defendants agreed to commit an unlawful act as thresholds for stating a cause of action for denial of meaningful access to the courts. *Hampton v. Hanrahan,* 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds sub nom; Hanrahan v. Hampton,* 446 U.S. 754, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980); *Singer v. Wadman*, 595 F. Supp. 188 at 270 (D. Utah 1982), *aff'd,* 745 F.2d 606 at 609 (10th Cir 1984).

The Ninth Circuit has recognized inadequate investigation as sufficient grounds to state a civil rights claim only when there was another recognized constitutional right involved. That is when a party claiming the denial of meaningful access to the courts has been denied a constitutionally protected right he may have grounds to assert a denial of meaningful access to the courts. *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985)(the Court found no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved).

Although the Ninth Circuit determined that the DeLews' § 1983 action for improper and inadequate investigation of a traffic accident was premature, it ruled that the action should not have been dismissed with prejudice and ordered it remanded to be dismissed without prejudice.

REASONS FOR DENYING THE WRIT

I.

THERE IS SUBSTANTIAL AUTHORITY INDICATING THAT WHEN A STATE COURT ACTION IS FILED THERE IS NO DENIAL OF "MEANINGFUL ACCESS TO THE COURT" AND A § 1983 ACTION CANNOT BE SUSTAINED.

The First, Fifth, Sixth, Seventh and Eighth Circuits have recognized that a plaintiff who has filed a viable State Court action has not been denied "right-of-access-to-the courts." In *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. denied,* 496 U.S. 974 (1990), abrogated on other grounds by *Horton v. California,* 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990), the plaintiff's claim for denial of meaningful access to the courts arose out of an illegal seizure and removal of property from the state. While the Circuit Court recognized the hardship which had been placed upon the plaintiffs in litigating their claim in a foreign jurisdiction, it simply stated:

> Although we agree that the removal of the seized property to Arkansas may have complicated, in some way, the Crowders' efforts to use the Texas judicial system to test the legality of the search and seizure or to recover the property, we cannot agree that the defendants' actions violated the Crowders' constitutional right of access to the courts. *Id.* at 813-14.

In its decision in this case the Ninth Circuit referenced the case of *Swekel v. City of River Rouge*, 119 F.2d 1259 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 690 (1998) and suggested that "meaningful access to the courts is denied when a party engages in pre-filing actions which effectively covers-up evidence. Pet.App p. 8a. However, as pointed out in the DeLew petition, (at p. 9, n.5)

the referenced language is merely dicta in the *Swekel* case. The *Swekel* Court ultimately held that the plaintiff could not bring a § 1983 action despite the fact that the police engaged in an immediate cover up of the second driver (the son of a high-ranking police officer) by failing to perform forensic tests on Mr. Swekel's clothes, ignoring the responding officer's report that two cars were involved; telling the responding officer not to attend the preliminary hearing, ignoring anonymous tips implicating the police officer's son, refusing to interview the police officer's son, and failing to disclose the tips to the plaintiff. The Sixth Circuit indicated that there was no showing that the plaintiff had been denied "access to the court" because she had not attempted to pursue a state court action.

The Sixth Circuit went on to state that when the plaintiff knows the identity of the defendant, has filed a state court action for damages and is aware of the alleged police cover up there is no § 1983 claim for denial of meaningful access to the courts. Specifically the Court observed:

> First, a court must ascertain whether the abuse occurred pre- or post-filing. When the abuse transpires post-filing, the aggrieved party is already in court and that court usually can address the abuse, and thus, an access to courts claim typically will not be viable. If the abuse occurs pre-filing, then the plaintiff must establish that such abuse denied her "effective" and "meaningful" access to the courts. *Bounds*, 430 U.S. at 822. She can do this only by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had. *See Crowder*, 884 F.2d at 812-13; Bell, 746 F.2d at 1261; Ryland, 708 F.2d at 974-75. In most instances, state courts can address pre-filing abuses by tolling the statute of limitations

> or allowing for a "spoliation of evidence" lawsuit. *Id.* at 1263-64.

Although the *Swekel* Court went to great lengths to distinguish its opinion in *Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) it nevertheless held that

> [b]efore filing an "access to court" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is the court to assess whether such access was in fact "effective" and "meaningful"?

Swekel v. City of River Rouge, *supra*. at 1264. The implication is that if in attempting to gain access to the State Court the plaintiff is successful and is allowed to pursue his action, then a § 1983 "access to the courts action" will not lie.

In the concurring opinion in *Swekel*, Judge Merritt points out some of the pitfalls of such cases and offers a workable remedy:

> The standard for a "right-of-access-to-the-courts" claim, whether treated under the First Amendment as part of the right "to petition the government for a redress of grievances" or as a procedural due process claim, should require that the plaintiff allege and prove that the state's judicial process does not provide fair procedures to remedy the wrong alleged. Proof of the lack of adequate state remedies is required by *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984), and *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), in procedural due process cases and should be required in judicial access cases. It seems elementary that the federal right of access to the courts is not abridged when the state courts remain just as open to provide a remedy as the federal courts.

The guidelines and insight in *Joyce v. Mavromatis*, *supra* provide specific direction in this case. In *Joyce*

> [t]he plaintiff knew the identity of the defendant, had a pending state court damage suit when the actions occurred, and could bring these allegations to the attention of the state court judge. Thus, the defendants did not deny her access to the courts, because she had all of the relevant facts at her disposal.

Id. at 57.

In the instant case the Petitioners, like those in *Joyce*, knew the identity of the Respondent Wagner, had a pending State Court damage suit and the State Court has already ruled that the Petitioners will be allowed to explore their allegations of wrongdoing by the police department. Cross-Pet.App. pp. 7a. A party who files a timely action in State Court, who is allowed to proceed with discovery and who can bring the investigation to the attention of the State Court judge has meaningful access to the courts.

In the case of *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063, 131 L. Ed. 2d 556, 115 S. Ct. 1692 (1995) the Seventh Circuit refused to extend the parameters of § 1983. In *Thompson*, the plaintiff claimed the police used excessive force and denied him access to the courts by omitting critical facts in their police reports. *Id.* at 852. The Seventh Circuit held that the defendants' actions did not amount to a denial of the plaintiff's right to access the courts because the plaintiff was present at the scene, knew all of the facts, and had sufficient facts to promptly file a law suit. *Id.* at 852-53. *See also Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995).

The First Circuit has recognized that a conspiracy to cover up the use of excessive force by police officers does not give

rise to a § 1983 cause of action when the injured party is able to pursue an action for damages in State Court. *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980). That court also held that when the plaintiffs are able to file a State Court action any claim of conspiracy or the mere filing of a false police report will not give rise to a § 1983 civil rights cause of action. *Id* at 745. The alleged actions of the police must result in some impediment to access to the state court.

In the case of *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996), the Eighth Circuit determined that although the plaintiff was raped by a police officer, the police investigation or lack thereof did not give rise to a separate cause of action.

> Andrews also appears to argue that she was injured by Price's failure to investigate her rape. We find this claim to be without merit. While Price's inaction after learning of Andrews' rape may be continuing evidence of his attitude of tacit authorization or failure to take remedial action, no further constitutional injury resulted to Andrews from this failure. Andrews never reported the incident herself and although she instructed her mother to "press charges," she did not inform her mother of the exact nature of the charge. Further, her mother decided not to pursue the matter. While Price's failure to investigate the rape may have violated state law and common sense, it did not rise to the level of a separate constitutional violation of Andrews' rights. *Id.* at 1078-79.

In *Hinckle v. City of Clarkburg*, 81 F.3d 416 (4th Cir. 1996), the plaintiffs claimed a conspiracy by police officers to deprive them of meaningful access to the courts. The Fourth Circuit Court of Appeals ruled that the evidence of conspiracy amounted to rank speculation and conjecture. The Court further

denied a claim for destruction of body parts after autopsy because there was a state remedy available to the plaintiffs.

The Circuit Courts that have dealt with § 1983 claims for interference with "meaningful access to the courts" have uniformly denied those claims when the facts are known to the plaintiff and when state courts are available in which to assert those facts.

II.

A § 1983 CAUSE OF ACTION FOR "DENIAL OF ACCESS TO THE COURTS" REQUIRES THAT THE CONCEALMENT OF THE TRUE FACTS BE OVER A SIGNIFICANT PERIOD OF TIME.

Where the courts have recognized a "denial of meaningful access to the courts" cause of action there has been a denial or concealment of the true facts over a significant period of time (*i.e.*, *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261-62 (7th Cir. 1984) (holding that cover-up which caused a twenty-year delay violated plaintiffs' right of access to the courts); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), (holding that cover-up which caused an eleven-month delay stated a claim for a violation of plaintiffs' right of access to the courts); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 824 (S.D. Ohio 1995) (holding that cover-up which caused a twenty-two to thirty-four-year delay violated plaintiffs' right of access to the courts); *Fisher v. City of Cincinnati*, 753 F. Supp. 681, 686-87 (S.D. Ohio 1990) (holding that one-year delay violated plaintiff's right of access to the courts). *Cf. Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995), *reh'g denied, cert. denied,* 134 L. Ed. 2d 648, 116 S. Ct. 1545 (1996)(holding six-month delay insufficient to show a violation of plaintiffs' right of access to the courts).

Equally significant is the Court's recognition in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) and *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), that the cover up prevented the plaintiffs from seeking any type of redress through the courts. The plaintiffs total lack of information concerning the true nature of events acted to prevent them from seeking redress through the courts. In explaining its decision in *Bell*, the Seventh Circuit recently stated,

> the cornerstone of our decision in Bell was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access.

Vasquez v. Hernandez, 60 F.3d at 329. In *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir.1996), *cert. denied,* 116 S. Ct. 1545, 517 U.S. 1156, 134 L. Ed. 2d 648 (1996), the Court deemed the "inadequate investigation" claim to be insignificant despite the passage of time because the plaintiff did little to pursue the claim.

The true test is two fold: (1) the prevention of full and open disclosure of facts crucial to the cause of action and (2) rendering hollow the plaintiffs' right to access to the courts. If either of the foregoing is missing there is no § 1983 denial of access to the courts.

In this action the Petitioners have had both open disclosure of the facts and meaningful access to the State Court.

III.

THE NINTH CIRCUIT MISAPPLIED THE PREREQUISITES OF A § 1983 ACTION AND SUGGESTED A WHOLLY UNWORKABLE SOLUTION.

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show the defendant acted "under color of law."

Lessman v. McCormick, 591 F.2d 605 at 609 (10th Cir. 1979); *see also Kernats v. O'Sullivan,* 35 F.3d 1171, 1175 (7th Cir. 1994); *Vasquez v. Hernandez,* 60 F.3d 325 at 328 (7th Cir. 1995).

The Ninth Circuit's decision has effectively eliminated the requirement that the plaintiff be deprived of a constitutional right. The decision suggests that the plaintiffs may be able to make a future constitutional claim and therefore the District Court erred in dismissing the claim with prejudice. Not only is such a remedy unwarranted, there are no guidelines upon which to implement its decision.

The statute does not provide for a "potential" claim. The statute is specific:

> **Every person who**, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, **subjects, or causes to be subjected**, any citizen of the United States or other person within the jurisdiction thereof **to the deprivation of any rights, privileges, or**

> **immunities secured by the Constitution and laws, shall be liable** to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. [emphasis added].

The decision of the Ninth Circuit relieves the plaintiff of showing that it has been subjected to a deprivation of a constitutional right. The Ninth Circuit suggests that it will hold a claim for "denial of meaningful access to the court" in suspension pending a trial at the state court level. Not only is its solution fraught problems,[2] it offers no guidelines to the District Court for deciding if the trial at the state court action was meaningful. When significant factual defenses are available to the defendant in state court action, is the defendant guaranteed that it will face a § 1983 action should she prevail in the state court? What recourse is available if the plaintiff prevails but the jury verdict is obviously a compromise verdict and the plaintiffs are wholly dissatisfied? Is a plaintiff required to take an appeal in the state court action before the federal action becomes ripe? What § 1983 rights do the plaintiffs have if they prevail at the trial level but are overturned by the state appellate court? Can the trial judge even consider summary judgment?

Rather than resolve, simplify, minimize or eliminate litigation, the Ninth Circuit decision in this case actually fosters

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2. The Ninth Circuit solution to reserve ruling for another day essentially forecloses the any possibility of settlement; the plaintiff would be unwilling to settle considering that it might foreclose the pending § 1983 action and the defendant could not settle without insisting on a dismissal of the federal action.

it. This decision serves to encourage and promote § 1983 actions in all future cases in which a litigant is dissatisfied with the police investigation.

IV.

THE RIGHT TO MEANINGFUL ACCESS TO THE COURTS DOES NOT GUARANTEE A FULL AND COMPLETE INVESTIGATION BY A STATE GOVERNMENTAL AGENCY.

The District Court's decision to dismiss the § 1983 action was reversed because the Ninth Circuit determined that "[t]he Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Petitioner DeLew's Appendix to Petition at 8a. This court did observe in *Chambers* at 148 that

> [t]he right to sue and defend in the courts . . . must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the *Federal Constitution.* (interior cites omitted)

However, access to the courts does not guarantee a police investigation nor does "every [alleged] act of deception in connection with a judicial proceeding gives rise [to a constitutional action]." *Vasquez v. Hernandez,* 60 F.3d 325 at 329 (7th Cir. 1995) quoting from *Bell* at 1265.

The Petitions and Cross-Petitions which have been filed in this case evidence the fact that the Petitioners now have a viable active action pending in State Court.

In the *Chambers* case this Court was there dealing with guaranteeing to the petitioner "equal protection" under Article IV, section 2, paragraph 1, of the Constitution of the United States. *Id.* That decision upholds the State's right to define access to the courts when it does not discriminate between the citizens of the various states. The *Chambers'* Court did not extend its ruling to the amorphous quagmire of "adequate investigation." There is nothing suggested by this Court in *Chambers* that implies that the adequacy or inadequacy of a police investigation is embraced within "right to sue and defend." In fact, *Chambers'* holds that a citizen must be given the same access to the courts as "the citizens of all other States to the precise extent that it is allowed to its own citizens."

The right of access to the courts finds a constitutional basis in the due process clause, which "assures that no person will be *denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell*, 418 U.S. 539, 579, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). The Seventh Circuit has suggested that the true criteria is whether the plaintiffs have been deceived into foregoing their legal remedies.

The critical factors missing from the present action are (1) the deprivation of a right, privilege, or immunity secured either by the Constitution or by federal law and (2) that the deprivation arose from one acting under color of state law. While the Petitioners claim that the police failed to properly investigate the accident, those assertions (while lacking evidentiary testimonial support) can be and are being presented and argued in the State Court action. The investigation has not prevented the Petitioners from seeking redress in the State Court, nor has it interfered with the ability to discover the alleged oversights. It should be noted that only where an investigation is part of a coverup, and where special circumstances exist under which the coverup results in a

plaintiff's inability to present a viable case in court, and where the coverup has been successful to some extent in denying a civil right may a § 1983 be invoked. In *Bell* the Seventh Circuit held that a successful twenty-year coverup of a police killing interfered with the due process right of access. 746 F.2d 1205. The *Bell* court specifically limited the holding to the "particularly egregious set of facts" presented in that case. *Id.* at 1264. More recently the Seventh Circuit cases have reached a different result. In *Vasquez* the Seventh Circuit reasoned that "the cornerstone of our decision in Bell was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access." 60 F.3d at 329. The Court went on to dismiss Vasquez' denial of access claim, holding that where the actual circumstances surrounding the shooting were revealed publicly within six months of the incident, and plaintiffs were granted access to records of investigation of the incident/coverup, their constitutional rights "were ultimately preserved." *Id.* Similarly, in *Gibson v. City of Chicago,* 910 F.2d 1510, 1520 (7th Cir. 1990) the Circuit ruled that even where a plaintiff successfully alleges the filing of intentionally false and inaccurate reports, he cannot state a claim for denial of access to the courts without alleging some concrete injury to the decedent's survivors resulting from the alleged coverup. 910 F.2d at 1523-24; *see also Thompson v. Boggs*, 33 F.3d 847, 852-53 (7th Cir. 1994)(police officers who omitted information from police reports did not deny access to court, since facts known plaintiff were sufficient to enable him to promptly file the instant lawsuit, unlike Bell, "where the true facts were concealed thereby denying the plaintiffs the opportunity to file a lawsuit until some twenty years after the fact."); *Bolden v. Ramos,* 1996 U.S. Dist. LEXIS 1544, 1996 WL 66135 at *11 (N.D. Ill, Feb. 13, 1996) (Where plaintiff is aware of the alleged coverup when filing complaint, he was hardly deceived into forgoing legal remedies").

Once again, it should be apparent from the ongoing State Court litigation that nothing that happened during the police investigation at the time of the DeLew/Wagner automobile accident has deceived the Petitioners into foregoing their State Court legal remedies. That action is not only proceeding with all due diligence, but is currently set for trial on February 12, 1999.

V.

THE RESPONDENT, JANET WAGNER, DID NOT ACT UNDER COLOR OF STATE LAW AND THE COMPLAINT DOES NOT PROPERLY ALLEGE A CONSPIRACY AGAINST HER TO BRING HER WITHIN THE PURVIEW OF § 1983.

To prevail on a § 1983 claim, a plaintiff must establish: (1) that a person acting under color of state law (2) deprived the plaintiff of a right secured by the Constitution or laws of the United States. *See Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Flagg Bros. v. Brooks*, 436 U.S 149, 155, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)). Thus, as a threshold issue, it must be determined whether Janet Wagner acted under color of state law.

Section 1983 actions may be brought to redress constitutional violations effected under color of state law. A private party may be considered to have acted under color of state law when it engages in a conspiracy or acts in concert with state agents to deprive one's constitutional rights. *United States v. Price*, 383 U.S. 787, 794, 16 L. Ed. 2d 267, 272, 86 S. Ct. 1152 (1966).

> A civil conspiracy is a "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an

> agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage,' " *Rotermund v. United States Steel Corp.*, 474 F.2d 1139 (8th Cir. 1973) (citation omitted). *Bell* at 1255. The elements of a conspiracy claim include an agreement between the defendants to commit an unlawful act and an overt act inflicting the particular injury of which the plaintiff complains. *Hampton v. Hanrahan*, 600 F.2d 600, 620-24 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980). Although the law does not demand proof that each conspirator understood the limits of the illegal plan or the identity of all participants, it does require the existence of some "single plan, the essential nature and general scope of which is known to each person who is to be held responsible for its consequences." *Hoffman-LaRoche*, 447 F.2d at 875; *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) at 1255.

Respondent Wagner was a civilian, neither employed by or acting on behalf of any governmental agency. She was merely driving her personal vehicle home from work when a bicyclist suddenly crossed in front of her. There was nothing about the bicycle/automobile accident which is alleged to have comprised a conspiracy. Rather, following the accident, when the police arrived and started their investigation, it is alleged that a conspiracy took place.

The Ninth Circuit, in dressing Mrs. Wagner with "color of law" simply states:

> In support of their conspiracy claim, the DeLews allege that Janet Wagner left the accident scene during the investigation and that the LVMPD and NHP offers permitted Wagner to do so.

The Court appears to ignore the requirement that there be "a combination of two or more persons acting in concert **to commit an unlawful act**, or to commit a lawful act by unlawful means." In this case, as indicated in Respondent Wagner's deposition (Cross-Petition Appendix B, pp 10a-15a.), she was escorted to a bathroom since there was not one at the accident scene. Certainly there is nothing illegal about (1) being escorted from an accident scene or (2) using the bathroom during an accident investigation. In fact, with an officer's permission, there is nothing illegal about leaving the scene of an accident after the investigation has commenced.[3]

Even construing the facts in a light most favorable to the DeLews, there is no inference that "leaving the scene of the accident" was an illegal act. It stretches even the most speculative imagination to infer that the use of the bathroom

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3. Nev. Rev. Stat. Ann. @ 484.219 (1997) provides :

> 484.219. Duty to stop at scene of accident involving death or personal injury; penalty 1. The driver of any vehicle involved in an accident on a highway or on premises to which the public has access resulting in bodily injury to or the death of a person shall immediately stop his vehicle at the scene of the accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of NRS 484.223.

NRS 484.223 provides:

> 1. The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall:
>
> (a) Give his name, address and the registration
>
> (Cont'd)

somehow played a role in denying the DeLew's access to the courts.

Respondent Wagner is not the spokesperson for the investigating agencies. The testimony of each of the investigating officers has been taken in deposition. That testimony should be taken at face value. That testimony does nothing to implicate Respondent Wagner in any kind of conspiracy. She was fully cooperative and complied with every request made. Only the most creative stretch of the imagination can provide any type of supposition which would cloak Janet Wagner with the "color of law" essential to impose § 1983 jurisdiction over her.

The facts alleged in the complaint do not constitute either an illegal act or the nexus for a conspiracy. The facts alleged against Respondent Wagner neither state nor imply an attempt to interfere with the Petitioners' civil rights. No cause of action is stated against Respondent Wagner.

(Cont'd)

> number of the vehicle he is driving, and shall upon request and if available exhibit his license to operate a motor vehicle to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in such accident;
>
> (b) Give such information and upon request manually surrender such license to any police officer at the scene of the accident or who is investigating the accident; and
>
> (c) Render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.

CONCLUSION

The DeLews' Petition for Writ of Certiorari is deficient in seeking relief from the Ninth Circuit in that the remedy granted to the DeLews is beyond the jurisdictional scope of 42 U.S.C. § 1983. The Ninth Circuit failed to recognize an existing wrong, but accepted jurisdiction in the event that a future wrong might be stated. The Ninth Circuit neither provided guidelines or standards for determining the basis of a future wrong and ignore rulings in other jurisdictions directly on point including the ruling in a case relied upon by it (*Swekel v. City of River Rouge*, 119 F.2d, 1259 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 690 (1998).

There is no basis in fact, law or pleadings upon which to vest the United States District Court with § 1983 jurisdiction over Janet Wagner. The Petitioners have not been denied due process or a constitutionally protected right, they have had full access to the State Court, and Respondent Wagner cannot be assumed to have been involved in a conspiracy.

It is respectfully requested that the DeLews' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. DELEW, *et al.*,

Petitioners,

v.

JANET KATHLEEN WAGNER, *et al.*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry (the "DeLews") submit this combined reply to the responses to the DeLews' Petition for Writ of Certiorari filed by Respondents Janet Wagner ("Mrs. Wagner") and Las Vegas Metropolitan Police Department, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner, and Officer Greg Goen (collectively referred to as the "Police Defendants").[1]

I.

THE POLICE DEFENDANTS' RESPONSE UNDERSCORES THE FLAWS OF THE NINTH CIRCUIT'S HOLDING THAT ADJUDICATION OF THE STATE TORT ACTION IS ALWAYS A PREREQUISITE TO PURSUIT OF A § 1983 ACTION; THIS COURT SHOULD REVIEW THE DECISION TO CORRECT THIS ERROR.

The Police Defendants attempt to defend on ripeness grounds the Ninth Circuit's dismissal of the DeLews' § 1983 claim. Respondent LVMPD's Brief in Opposition to Petition for Writ of Certiorari ("Police Defendants' Resp.") at 9-13. They further argue that the dismissal pending the outcome of

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[1] This reply is primarily to the Police Defendants' opposition brief. Although Mrs. Wagner's opposition brief purports to respond to the DeLews' Petition for Writ of Certiorari, it is in fact an additional brief in support of her Conditional Cross-Petition for Writ of Certiorari. Because the arguments in Mrs. Wagner's opposition brief have nothing to do with the narrow issue as to which the DeLews seek certiorari review, the DeLews do not burden the Court with a reply to the non-responsive and essentially irrelevant arguments in Mrs. Wagner's filing.

the state wrongful death action was a proper deferral of the DeLews' claims until the amount of their damages becomes established beyond "pure conjecture." *Id.* at 17. However, the Ninth Circuit makes no mention of ripeness in its brief and cryptic discussion of the dismissal of the DeLews' claim; nor does the court suggest that it dismissed based on uncertainty as to the amount of the DeLews' damages:

> To prevail on their claim, the DeLews must demonstrate the defendants' cover-up violated their right of access to the courts by rendering "any available state court remedy ineffective." However, because the DeLews' wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred.
>
> . . .
>
> We conclude that the district court should have recognized the cognizability of the DeLews' claims and dismissed their complaint without prejudice. By disposing of the case in this fashion, the DeLews would have the opportunity to re-file their section 1983 action if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective.

DeLew v. Wagner, 143 F.3d 1219, 1222-23 (9th Cir. 1998).

What the Ninth Circuit did was not based on ripeness or damages principles. Instead, the court adopted an arbitrary rule that a § 1983 plaintiff *never* can even attempt to establish the ineffectiveness of "all state court remedies" until the completion of the state case. This Court should grant the DeLews' petition in order to review this novel holding which,

as the DeLews discuss *infra* at 5-10, finds no support in decisions of this or other courts.

This Court's review is especially warranted because it has neither considered the dimensions nor decided the procedural ramifications of the right of meaningful access to the courts where a governmental cover-up is alleged. Cover-up claims are fundamentally different from the inadequate-prison-law-library-and-paralegal-support claims that the Court considered most recently in *Bounds v. Smith*, 430 U.S. 817 (1977), and *Lewis v. Casey*, 518 U.S. 343 (1996). A cover-up, by definition, involves affirmative misconduct by a state actor to destroy, falsify, or conceal evidence; by contrast, the prisoners' suits alleging denial of access to the courts challenged relatively less sinister official *in*action.

Cover-up claims differ from prisoner suits in another important respect: A cover-up may result, as it did in this case, in the irretrievable loss of unique and critical evidence, with concrete and immediate injury to the citizen-victim. This injury is real and instant notwithstanding the victim's possible ability to file and prosecute an action challenging the underlying wrong; while that claim may proceed, it will do so like a wounded bird—crippled by the irreparable damage done through the cover-up. This quality of a successful cover-up—one that "succeeds" in permanently depriving a citizen of vital evidence—warrants a rule of law that such claims may proceed even before the conclusion of the separate but handicapped lawsuit for the original wrong. Any other outcome would reward police and other state actors for their affirmative misconduct in the cover-up by further delaying justice where justice already has been inexcusably assaulted and delayed.

Here, the DeLews alleged specific affirmative acts that resulted in the destruction or unavailability of critical evidence. *See* Supplemental Appendix to LVMPD's Brief in Opposition to Petition for Writ of Certiorari 7-8 (Complaint) at ¶¶ 22(a)-(j). By removing Mrs. Wagner from the scene of the collision

and by responding falsely to the inquiry of an investigating state patrolman about the smell of alcohol on Mrs. Wagner's breath, the Police Defendants blocked the timely collection of adequate blood for testing, which was the most critical evidence of her intoxication. The effect was to render the evidence of alcohol found in her blood more than three hours later inadmissible in a criminal trial under Nevada law and compromised in any civil action. Other affirmative acts included (a) the Police Defendants' preparation of fabricated witness statements (and their decision *not* to take statements from other percipient witnesses), (b) their deliberate deviation from standard investigation procedures regarding the preservation of skid marks and the performance of a field sobriety test, and (c) their false statements to the DeLews, to the coroner's office, and in their official reports, which dishonestly placed the blame for the collision on Erin DeLew rather than Mrs. Wagner.[2]

Against this background, Mrs. Wagner's statement that the DeLews have had "free, complete and total access to the accident investigation and facts surrounding this accident," Respondent's Brief in Opposition ("Wagner's Resp.") at 2, is

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[2] The Police Defendants accuse the DeLews of "unsupported histrionics" in their statement of the case. Police Defendants' Resp. at 5. But there is nothing either unsubstantiated or overblown about the DeLews' recitation of the facts. Rather, the DeLews properly rely on the allegations of their complaint, which must be construed in the light most favorable to the DeLews. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Only the defendants are playing fast and loose with the facts—both by straying outside the complaint to one-sided testimony and exhibits, and by asserting as "fact" points that have no support whatsoever in the record below. *See, e.g.*, Police Defendants' Resp. at 5 n.7, 6 (discussing statement of purportedly "independent" witness Susie Olsen (Mrs. Wagner's neighbor) and Mrs. Wagner's self-serving deposition testimony), 18 (claiming without any record support—and contrary to F.R.E. 408—that Mrs. Wagner is "virtually impecunious" and that her insurance company has offered to settle the DeLews' claims for the full amount of her insurance policy).

patently false. *See also* Police Defendants' Resp. at 7, 13. The DeLews will not have "complete and total access" to at least two critical facts: just how drunk Mrs. Wagner was when she hit Erin DeLew, and how the collision occurred, specifically, whether Mrs. Wagner ran Erin down, as the DeLews contend and the unrecorded physical evidence would have established. Moreover, Officer Wagner, who was the cover-up conduit between Janet Wagner and the Police Defendants, completely avoided any deposition, and Janet Wagner's deposition was limited, by their assertion of Nevada's marital privilege—denying the DeLews complete and total access to the facts. When, as here, the government cover-up has destroyed or falsified evidence going to the very heart of a citizen's claim for relief, there is necessarily a breach of the right of meaningful access to the courts; there is no good reason in fact, law or policy for forcing that citizen to pursue through completion a futile lawsuit to remedy the underlying wrong before the citizen may pursue his or her § 1983 claim.

The Court should grant the DeLews' petition in order to address the harshness of the Ninth Circuit's dismissal of the DeLews' constitutional claim pending the outcome of the state wrongful death action.

II.

THE POLICE DEFENDANTS ERR IN STATING THAT THE MAJORITY OF THE CIRCUITS AGREE WITH THE NINTH CIRCUIT; IN FACT, THE CIRCUITS HAVE DISAGREED AS TO WHEN A COVER-UP VICTIM MAY ASSERT A § 1983 CLAIM, AND THIS COURT SHOULD RESOLVE THAT CONFLICT.

The Police Defendants argue that the majority of circuits agree with the Ninth Circuit's dismissal of the DeLews' § 1983 claim until the completion of the state wrongful death action. Police Defendants' Resp. at 15. However, they are able to cite

to decisions of only three circuits as constituting this "majority." Of the three circuits they cite, none has issued an opinion that actually supports the Ninth Circuit's holding in this case. The uniformity among the circuits that the Police Defendants hail is in reality non-existent.

Far from majority agreement among the circuits on the impact of a claim for the underlying, covered-up wrong, the decisions reveal a genuine inconsistency in approach and result. In this case, the Ninth Circuit purported to follow the approach of the Sixth Circuit in *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), *cert. denied sub nom, Swekel v. Harrington*, ___ U.S. ___, 118 S. Ct. 978 (1998). However, the Ninth Circuit's adherence to *Swekel* was misguided at best.

The *Swekel* panel simply held that (a) a § 1983 plaintiff must establish that a police cover-up "foreclosed her from filing suit in state court or rendered ineffective any state court remedy she may have had," *id.* at 1263-64; (b) Mrs. Swekel failed to meet her burden of proof because she presented no evidence that the state court, if she had filed a state court action, could not have addressed the evidentiary problems created by the cover-up, *id.* at 1264; and (c) therefore, summary judgment was appropriate. *Swekel* further recognized that a § 1983 action based on a cover-up may be viable even where the victim has not attempted to file a separate tort action, where there is evidence that "it would be completely futile for a plaintiff to attempt to access the state court system." *Id.* at 1264 n.2. The Ninth Circuit transformed these fact-specific rulings in *Swekel* into a universal rule of law: a court *never* can decide the effectiveness or ineffectiveness of a suit challenging the underlying wrong until final adjudication of the underlying claim. *DeLew*, 143 F.3d at 1223.[3] The

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[3] If the Ninth Circuit had adhered to *Swekel*, it would not have dismissed the DeLews' claims. The complaint—the only factual material properly before the court for purposes of deciding whether to dismiss the claims against the Police Defendants—plainly alleges that the cover-up resulted in the destruction of critical evidence (including suitable blood

decision below is not consistent with, but rather departs significantly from the Sixth Circuit's analysis.

The Fifth Circuit, contrary to the Police Defendants' contentions, does *not* "limit[ ] the 'interference' associated with an alleged 'cover-up' to the filing of a complaint." Police Defendants' Resp. at 15. Rather, that court has held that a cover-up victim may proceed with a § 1983 claim without ever having filed suit to challenge the original wrong, much less without first adjudicating the underlying claim and then showing that any and all remedies are inadequate. *See Ryland v. Shapiro*, 708 F.2d 967, 975-76 (5th Cir. 1983). In *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994), the Fifth Circuit's most recent decision on the issue, the court had the chance to hold that the right of meaningful and unimpaired access to the courts extends only to the right to file suit, but the panel declined to so hold. Instead of dismissing the § 1983 claim because the plaintiff had filed suit in state court, the court chose to dispose of the case on qualified immunity grounds:

> The city officials counter that the right does not encompass a right to proceed free of discovery abuses by a governmental entity involved in a civil lawsuit in state court, *but protects only the right to institute the action*. In addition, they assert that even if a more broadly-based right exists now, it was not clearly established in 1985-88, the time of the alleged conduct. *We agree with this latter contention*.

Id. at 429 (emphasis added). To the extent that *Foster* may appear to tie meaningful access to the mere ability to file a state tort complaint, as the Police Defendants argue, *see* Police

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(cont'd.)..

draws, skid marks, witness identities and statements) greatly impairing their ability to obtain complete relief in their wrongful death action.

Defendants' Resp. at 15-16, the Fifth Circuit panel was discussing only the status of the law during 1985-1988 (for qualified immunity purposes), and not the law in 1994 when the cover-up began.

Once again, the Police Defendants err in stating that the Seventh Circuit approach is consistent with the decision below. In the seminal police cover-up case, *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the Seventh Circuit permitted plaintiffs to proceed under § 1983 despite their filing and settlement of a wrongful death action twenty years earlier. Any intimation that the Seventh Circuit has retreated from *Bell* is baseless. In *Nielsen v. Clayton*, 62 F.3d 1419 (Table), 1995 WL 417569, at *7 (7th Cir. July 11, 1995), and *Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984), the district courts allowed the cover-up-based civil rights claims to be tried simultaneously with the claims based on the underlying wrongs. The Seventh Circuit affirmed both decisions. *Stone*, 738 F.2d at 899; *Nielsen*, 1995 WL 417569 at *7 ("The violation of the right of access to the courts, however, need not necessarily entail or result in the denial of a party's right to pursue a claim in court") (citing *Bell*).

The Police Defendants' reliance on *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995), and *Thompson v. Boggs*, 33 F.2d 847 (7th Cir. 1994), is likewise futile. In *Vasquez*, the Seventh Circuit simply held that plaintiffs' § 1983 claim could not proceed without "allegations claiming that the Vasquezes have been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up." *Vasquez*, 60 F.3d at 329. The court did *not* adopt a legal bar to § 1983 claims until completion of the state tort litigation (and proof of its actual ineffectiveness) in all cases. *Thompson* involved a fundamentally different set of circumstances. There, the claimed denial of meaningful access to the courts was based exclusively on police officers' alleged failure to state the plaintiff's allegations of excessive force in their police report. In dismissing the claim, the district court

correctly observed that "[t]here is a substantial difference between allegations that the police concealed or falsified documents and claims that the police failed to state a legal conclusion in a police report.'" *Id.* at 850 (quoting district court). Affirming, the Seventh Circuit held that plaintiff could not state a claim for deprivation of his right of access where "he was personally involved in the incident and thus had firsthand knowledge of all the facts and circumstances surrounding his arrest." *Id.* at 852. In that situation, the plaintiff could obtain effective redress of the claimed underlying wrong by providing the relevant information himself; therefore, the meaningful access claim was properly dismissed with prejudice for failure to state a claim. In this case, by contrast, the DeLews alleged an affirmative cover-up that permanently destroyed evidence which, due to her death, Erin DeLew *cannot* supply at the wrongful death trial. Here, unlike *Thompson*, the DeLews ability to prove their state wrongful death action has been impaired and impeded.

Other circuits—ignored by the Police Defendants—also do not follow the Ninth Circuit's approach in this case. *See Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989) (remanding constitutional claim for trial); *Barrett v. United States*, 689 F.2d 324, 331-32 (2d Cir. 1982) (permitting right of access claim to proceed without requiring plaintiff to first show actual lack of success in separate Federal Tort Claims Act lawsuit).

In circuits that have not directly addressed this issue, the district courts likewise have not adopted the Ninth Circuit's draconian view. *See Stump v. Gates*, 777 F.Supp. 808, 816-19 (D.Colo. 1991) (allowing cover-up-based right of access claim to go forward without initial resort to state court); *Agresta v. Sambor*, 687 F.Supp. 162 (E.D. Pa. 1988) (permitting meaningful access claim to proceed without any resort to state court in order to prove inadequacy of state tort remedy); *Waller v. Butkovich*, 584 F.Supp. 909, 941 (M.D.N.C. 1984) (refusing to dismiss right of access claim because it could not

say that the plaintiffs would be unable to prove any set of facts establishing damages due to the cover-up).[4]

In short, there is anything but agreement between the circuits on this issue. While the right of access to the courts is well-recognized under the Constitution, the dimensions of that right when there has been a police cover-up are far from settled. When state actors take affirmative steps to cover-up wrongdoing and destroy and falsify critical evidence, victims should be able to obtain uniform protection of their right of access to the courts regardless of where the cover-up happened to occur. All other courts say the constitutional right to meaningful access is infringed where the defendants "hinder" or "impair" or "prejudice" the underlying claim. The impairment need not be complete or completely wipe out the claim. The Ninth Circuit now says that a plaintiff must show that "any" and "all" remedies were actually rendered ineffective. This is a much greater burden by a quantum leap. This Court should exercise its discretion on certiorari to reject an arbitrary rule requiring a cover-up victim to prosecute to conclusion a state tort claim in order to establish a deprivation of meaningful access to the courts in a § 1983 action.

CONCLUSION

The Court should grant the DeLews' Petition for Writ of Certiorari.

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[4] The Police Defendants quote selectively from *Waller* in their response at page 16. What they fail to mention is the ultimate holding in that case: "[T]he court cannot say the plaintiffs can prove no set of facts in support of [their denial of access claim] that would entitle them to relief. The extent and nature of their damages, if any, from the cover-up is a factual question that cannot properly be resolved on motions to dismiss." *Waller*, 584 F. Supp. at 941.

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